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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, *et al,*
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

Oliphant v. Suquamish Indian Tribe, et al.[1] The opinion of the Ninth Circuit Court of Appeals is reported at 544 F.2d 1007 (1976).[2] The memorandum opinion of the District Court for the Western District of Washington is unreported.[3]

1. In the Ninth Circuit, this case was captioned *Oliphant v. Schlie, et al.* It shall hereinafter be referred to as *Oliphant*.

2. That opinion is set forth in the Appendix at 55-64. The dissent thereto is set forth in the Appendix at 65-73. All references in this brief to the Appendix refer to the printed Appendix filed with this Court on August 8, 1977, pursuant to Rules 17 and 36.

3. That opinion is set forth in the Appendix at 48-52.

Belgarde v. Suquamish Indian Tribe, et al.[4] There is no Ninth Circuit Court of Appeals opinion in this case, since this Court granted certiorari before judgment in the Ninth Circuit.[5] The Order Denying Writ of Habeas Corpus of the District Court for the Western District of Washington and the Report and Recommendation of United States Magistrate adopted by the District Court are unreported.[3]

JURISDICTION

In *Oliphant*, the judgment of the Ninth Circuit Court of Appeals was entered on August 24, 1976, (Appendix at 55).

In *Belgarde*, the judgment of the District Court for the Western District of Washington was entered on August 22, 1975, (Appendix at 124). Notice of Appeal to the Ninth Circuit was filed September 4, 1975, (Appendix at 125).

The joint Petition for Writ of Certiorari was filed November 22, 1976, and was granted June 13, 1977, (Appendix at 129). The jurisdiction of this Court in *Oliphant* rests on 28 U.S.C. §1254(1), and in *Belgarde* on 28 U.S.C. §1254(1) and Rule 20 of this Court.

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4. In the District Court, this case was captioned *Belgarde v. Morton et al.* It shall hereinafter be referred to as *Belgarde*.

5. In fact, certiorari was granted prior to the submission of briefs or occurrence of oral argument in the Ninth Circuit. The parties had stipulated that the Ninth Circuit's proceedings in *Belgarde* be held abeyance pending the Ninth Circuit's decision in *Oliphant* (Appendix at 126-27). Based on that stipulation, the Ninth Circuit so ordered (Appendix at 128). Subsequent to the Ninth Circuit's decision in *Oliphant*, Belgarde moved that the Ninth Circuit stay further proceedings in this case pending disposition of the Petition for Writ of Certiorari to this Court. The Ninth Circuit then entered a 35 day stay order. Well after the expiration of that stay order, but prior to the occurrence of any further Ninth Circuit proceedings in *Belgarde*, this Court granted certiorari.

6. The District Court Order and Magistrate Report are set forth in the Appendix at 122-23 and 110-21, respectively.

QUESTION PRESENTED

Petitioners, non-Indians, were charged in Suquamish Tribal Court with committing minor offenses under the Tribal Code against the personnel and property of the Tribe. The alleged offenses took place on the Port Madison Indian Reservation, which has been set aside for the exclusive use and occupancy of the Suquamish Tribe:

> Does the Tribal Court have jurisdiction over Petitioners' alleged offenses?

TREATIES, STATUTES, AND ORDINANCES INVOLVED

Treaty of Point Elliott, 1855, 12 Stat. 927, (Set out at 6a-7a of the Appendix to Brief for Petitioners, hereinafter referred to as App. Pet. Brief).

1934 Indian Reorganization Act §16, 25 U.S.C. §476 (App. Pet. Brief at 16a).

18 U.S.C. §1152 (1970) (App. Pet. Brief at 14a-15a).

Public Law 83-280, §§6, 7, 67 Stat. 588 (1953) (App. Pet. Brief at 17a).

1968 Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. §1302 (App. Pet. Brief at 17a-18a).

Revised Code of Washington §37.12.010 (App. Pet. Brief at 20a).

Constitution and By-Laws of the Suquamish Indian Tribe (July 2, 1965) (App. Pet. Brief at 4a-6a).

Law and Order Code of the Suquamish Indian Tribe (1973) (App. Pet. Brief at 21a-47a).

STATEMENT

Respondents adopt as their own the Statement set out in the Brief for the United States as Amicus Curiae at 2-8.[7]

The record[8] discloses that there were 550 members of the Suquamish Tribe at the time of the events in issue. Approximately 150 of those members lived on the Port

7. However, two matters in that Statement, although ancillary to this case, should be corrected: (1) All allotted lands on the Port Madison Reservation, whether held in trust or for which fee patents have been issued, were specifically allotted under Article VII of the Treaty of Point Elliott, 1855, 12 Stat. 927, and *not* (as the Brief for United States at 4 states) under the General Allotment Act of 1887, 24 Stat. 388. (2) The Agreement of 1904, ratified by Congress in 1905, 33 Stat. 1078, did *not* (as the Brief for United States at 3 n.2 states) diminish the Port Madison Indian Reservation. Under the Agreement the involved 48 acres were not opened to public settlement but rather simply purchased by the United States for use specifically as a military installation.

8. Amicus Kitsap County apparently feels unconstrained by the applicable rules of appellate procedure regarding the factual record on appeal. Disregarding the rule that an appellate court has properly before it only those adjudicative facts contained within the record on appeal, Kitsap County attempts (Brief for Amicus Curiae Kitsap County at 2-20 and 1a-5a) to "supplement" that record in wholesale fashion on the asserted basis that this is done to provide this Court with a "complete picture" (*Id.* at 3) of allegedly relevant adjudicative facts. Perhaps the most outrageous example of this is the effort to inject into the record new "evidence" regarding the very facts of Petitioner Belgarde's arrest (*Id.* at 11-12). In point of fact Kitsap County's Statement of the Case (*Id.* at 2-20) is *rife* with instances of similarly improper allegations, many of which are misleading or grossly inaccurate and others of which are wholly irrelevant. In light of this, Respondents feel no obligation to rebut *specifically* this material. Furthermore, it is submitted that the most appropriate response would be for this Court to strike the involved portions of the Brief for Amicus Curiae Kitsap County, which appear therein at 2-20 and 1a-5a.

Officials of Kitsap County, including the Prosecuting Attorney, were in fact well aware of both *Oliphant* and *Belgarde* during the many months in which each was under consideration in the District Court. However, they made no attempt during that time to bring *any* factual material before the District Court. Therefore, there would be no element of inequity in this Court's striking this material. On the other hand, substantial inequity would result if this Court in any way relied on this improper material, since the record made below has with full justification been relied on by not only the parties hereto, but also the District Court and Court of Appeals below.

Madison Reservation. The remaining members lived in nearby communities which afforded better employment opportunities. In addition, 50 Indians with other tribal affiliations lived on the Reservation. (Supp. R. 119 and 154).

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present only a narrow question regarding the legal authority of a particular Indian tribe, in the setting of a particular fact situation. Therefore, although Petitioners ~~Respondents~~ would have this Court believe that it must determine here whether *all* Indian tribes possess *full* criminal jurisdiction over non-Indians on the reservation as to *all manner* of criminal offenses, this is indeed not the case. In point of fact, these cases only involve: the Suquamish Indian Tribe, which is shown to have a unique treaty history bearing vitally on the issue presented; minor criminal offenses; moreover, offenses directly assaultive against the Tribe's personnel and property; and a record of unresponsiveness of other law enforcement personnel—county and federal—both generally and as to Petitioners' alleged offenses particularly.

Furthermore, the Tribe is *not* contending that the criminal jurisdiction it exercised in these cases is exclusive. Rather, it maintains that this jurisdiction is *concurrent* with any other operative criminal jurisdiction—whether federal or state (if in fact state jurisdiction actually exists under Public Law 83-280).

In addition, the tribal court in which Petitioners were charged is *not* a Bureau of Indian Affairs Court of Indian Offenses. Therefore, the judicial and regulatory restric-

tions on such administrative courts have no relevance in these cases. Rather, Petitioners were charged in the Suquamish Tribal Court, a creation of the Tribe itself, with powers flowing directly from the Tribe.

Finally, Petitioners do not here attack the criminal *procedures* followed in these cases by the Tribal Court and Tribal police. They attack only the jurisdictional base for those procedures.

Petitioners (and the dissent in the Ninth Circuit) argue that Indian tribes have generally not exercised criminal jurisdiction over non-Indians over the last 100 years, and that that inactivity is legally relevant to these cases. But, there are two broad answers to this contention.

First, there is no legal basis for the argument. Tribal power does not cease to exist merely because a tribe over a long period of time chooses, for whatever reason, not to assert the power.[9]

Second, the real reasons for tribal disuse of this jurisdictional power are not legal but historical and sociopolitical. As this Court has noted, over the last century the Bureau of Indian Affairs has exercised "plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes."[10] As a result, Indians have suffered. "The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests."[11] It created a sense of despair and impotence among the tribes. People so indoctrinated do not aggressively assert the full measure of their rights. In the

9. Department of the Interior, *Federal Indian Law*, 402 (1958).
10. *Morton v. Mancari*, 417 U.S. 535, 542 (1974).
11. *Id.* at 553.

area of criminal jurisdiction, this sense of powerlessness was aggravated by a federal policy discouraging tribal assertion of jurisdiction over non-Indians.[12]

However, Indian tribes now have a dramatically different and positive point of view. This is a product of an enlightened federal policy, which commenced in the mid-1960's and continues through the present date, which encourages Indian tribes to take responsibility for their affairs and the governance of their reservations. A reassertion of dormant tribal powers, such as that involved in these cases, has been both a natural and federally-intended result.

In addition, the assertion of tribal criminal jurisdiction over non-Indians has been *necessary*. This is confirmed by the law enforcement vacuum revealed by the record in these cases, and by reservation law enforcement conditions described in the briefs of amici supporting Respondents.

Interestingly, as indicated in those briefs of amici, in recent years tribal law enforcement has been both vigorous and extensive against both Indians and non-Indians. The dearth of federal litigation arising from that tribal law enforcement is, therefore, quite remarkable. It is also instructive. Clearly, the paucity of litigative challenge to, or criticism of, tribal law enforcement confirms that it is both sound and essential.

Congress has recently set about purposefully dealing with these matters. Under Public Law 93-580,[13] the Ameri-

12. Two noted commentators, both of whom conclude that the federal law does not deprive Indian tribes of jurisdiction over non-Indians, have averted to this policy. Price, *Law and the American Indian*, 172, 173 (1973); Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 558 (1976).
13. 88 Stat. 1910 (1975).

can Indian Policy Review Commission was established to conduct a comprehensive review of the historical and legal developments underlying the Indians' relationship with the federal government and to make recommendations for the revision of existing law and policy. The Final Report of the Congressional Commission, submitted to Congress in May, 1977, is a thorough and revealing review of these issues.

The issue at hand was thoroughly studied by the Commission, with the following conclusions (Final Report at 154):

> There is an established legal basis for tribes to exercise jurisdiction over non-Indians.
>
> There has been a demonstrated need for the exercise of some tribal jurisdiction over non-Indians within Indian reservations.

Respondents are therefore aware that, in the final analysis, the nature and scope of tribal criminal jurisdiction are perpetually subject to change by congressional action. Indeed, the Final Report of the American Indian Policy Review Commission may precipitate such action. However, these cases, of course, turn on the law as it presently exists, which, Respondents will show, was properly interpreted by the courts below.

Respondents contend that the Suquamish Indian Tribe properly exercised jurisdiction over the offenses allegedly committed by Petitioners. In support of this contention, Respondents make the following argument:

(1) Indian tribes possessed, in the first instance, the full sovereign powers of any nation. Upon entering into treaties with the United States, certain of these powers, in particular the international powers, were qualified, but

the tribes retain all of their domestic powers which have not been taken away by treaty or by express statute. Support for this proposition is shown in a continuum of the cases of this Court spanning 150 years. Therefore, all treaties and statutes affecting the powers of the Suquamish Tribe must be examined.

(2) The early treaties and statutes establishing the relationship between Indian tribes and the United States recognized tribal authority over non-Indians as one of these inherent tribal powers. And, the 1834 Trade and Intercourse Act, predecessor to the present general federal crimes statute (18 U.S.C. §1152), did not extinguish that tribal jurisdiction, which continued concurrent with federal jurisdiction. In fact, the legislative history of the 1834 Act confirms this continuing tribal jurisdiction over the activities of non-Indians on reservations. Analysis of some important post-1834 statutes and treaties further confirms the continuance of this jurisdiction. Finally, Petitioners' authorities cited for the proposition that tribal jurisdiction does not extend to non-Indians are rebutted.

(3) The facts and circumstances surrounding the execution of the Treaty of Point Elliott (the Suquamish treaty), are thoroughly analyzed. The proposed draft treaty would have expressly terminated tribal authority over non-Indians. However, the provisions proposed to accomplish this were the *only* draft provisions not incorporated into the final treaty. This analysis conclusively rebuts the assertion that the Suquamish Indian Tribe surrendered such authority by treaty.

(4) Early and recent cases confirming tribal authority over the activities of non-Indians are identified. In addition,

recent decisions of this Court are relied upon to show that neither the non-Indian identity of the party, nor the non-trust status of the involved land, are relevant to the reach of tribal jurisdiction. Finally, a proposed jurisdiction standard—termed "tribal subject matter jurisdiction"—is presented. Under this standard, a tribe possesses jurisdiction over those on-reservation activities of non-Indians as to which there is a "sufficient tribal interest." Decisions of this Court in analogous areas are brought forth in support of this proposed jurisdiction standard.

(5) Two federal statutes stand as a statutory confirmation of tribal power over the activities of non-Indians. In particular:

a. The Indian Reorganization Act of 1934. Its purposes confirm the tribal power, as does an authoritative opinion of the Solicitor of the Department of the Interior issued upon enactment of the Act; and

b. The Indian Civil Rights Act of 1968. Its terms and legislative history confirm the tribal power.

(6) Respondents' position is consonant with the declared federal Indian policy, which strongly supports tribal assumption of governmental authority over the reservation. Furthermore, the law enforcement conditions on the Port Madison Reservation confirm the soundness of this dynamic federal Indian policy.

(7) Petitioners' contention that jurisdiction over their offenses rests *exclusively* with State of Washington is rejected. First, the claim of state jurisdiction under Public Law 83-280 is shown to be invalid because of a failure to effect a federally-required amendment of the State Constitution. Second, Port Madison is shown to be, at most, a "partial" state jurisdiction reservation because of retrocession by the State of the initially assumed "total" jurisdiction. Third, the partial jurisdiction is in any event invalid because it is either not permitted by Public Law 83-280 or a denial of equal protection of the laws. Fourth, if the State has partial jurisdiction, it would cover Petitioner Belgarde only. In conclusion, *any* state jurisdiction over the Petitioners based on Public Law 83-280 is *concurrent* with that of the Tribe.

ARGUMENT

1. The Suquamish Tribe Possesses Those Inherent Governmental Powers Not Expressly Extinguished By Treaty or Statute.

The jurisdiction of the Suquamish Indian Tribe at issue in these cases derives principally from the Tribe's retained inherent powers of government over the Port Madison Indian Reservation. More particularly, the Tribe asserts that—as a continuing attribute of its political authority over the Reservation—it may by appropriate means regulate non-Indian conduct occurring on the Reservation and affecting essential Tribal interests. Finally, it is the Tribe's position that under this authority it may prosecute non-Indians alleged to have committed on-Reservation minor offenses under the Tribal code against the Tribe's personnel and property.

Analytically, Respondents will proceed fundamentally on the basis of the following cardinal principle of federal Indian law:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed,

> in the first instance, all the powers of any sovereign State. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the Tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government.

Department of the Interior, *Federal Indian Law* 398 (1958).

This principle finds both its source and continuing vitality in a series of decisions of this Court spanning approximately 150 years.

In the seminal case *Worcester v. State of Georgia*, 6 Pet. 515 (1832)—the foundation for the development of federal Indian Law—Chief Justice Marshall confirmed that Indian tribes are both dependent conquered nations and sovereign governments with full power over their people and territories. Marshall held that Indian nations:

> had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power. . . .

6 Pet. at 559.

The concept that the political powers of Indian tribes derive from a form of sovereignty, rather than from delegations of power by the United States, was recognized by this Court in *United States v. Kagama*, 118 U.S. 375 (1886):

> They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations. . . .

118 U.S. at 381-82.

This was again confirmed in *Talton v. Mayes*, 163 U.S. 376 (1896). In holding that the Fifth Amendment did not reach the criminal procedure of tribal courts, this Court acknowledged that the powers of Indian tribal courts derive from the continuing inherent sovereignty of the tribe, and not from federal delegation.[14]

In 1934, the Solicitor of the Department of the Interior synthesized this rule in the following manner, in a major opinion issued upon passage of the 1934 Indian Reorganization Act, 48 Stat. 984:

> Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designated to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content.

Powers of Indian Tribes, 55 I.D. 14, 19 (1934). *See also* 55 I.D. at 19-30.

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14. *See* discussion in Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 556-57 (1976) [hereinafter cited as Clinton (1976)].

Then, in *Williams v. Lee*, 358 U.S. 217 (1959) it was observed that the principles of *Worcester* have been modified by this Court *only* in those instances not involving essential tribal interests or Indian rights:

> Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained.

358 U.S. at 219. *See McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 168-72 (1973).

More recently, in *United States v. Mazurie*, 419 U.S. 544 (1975) this Court held:

> Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 6 Pet. 515, 557 (1832). . . .

419 U.S. at 557.

In summary, a continuum of this Court's decisions, over the past one and one-half centuries, consistently reflects that Indian tribes have from the outset been, and remain today, "quasi-sovereign" political entities. *Morton v. Mancari*, 417 U.S. 535, 554 (1974); *Fisher v. District Court*, 424 U.S. 382, 390 (1976).[15]

Analytically, then, the precise questions to be answered are: (1) does the jurisdictional power exercised by the Suquamish Tribe in these cases fall within its original inherent powers of sovereignty? and (2) if so, has Congress, by statute or treaty terminated that power?

Finally, in answering this second question, it is essential to recall that such termination of a power of a tribe must

15. *See* Brief for Amici Quinault Tribe and Lummi Tribe for an extensive analysis of the sovereignty doctrine.

be done expressly, and will not be implied:

> According to a familiar rule, legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred.

United States v. Nice, 241 U.S. 591, 599 (1916).

These questions will now be addressed. An analysis of all relevant treaties and statutes reveals that the jurisdictional power exercised by the Suquamish Tribe in these cases is an attribute of its original sovereignty which has not been expressly terminated and which remains, therefore, a power of the Tribe today.[16]

2. Through Early Statutes and Treaties, the United States Recognized Tribal Authority Over Non-Indians. That Authority Has Not Been Subsequently Extinguished By Statute.

As discussed in section 1, *supra* there is no question but that Indian tribes, as separate and distinct nations, possessed the usual accoutrements of a sovereign government. That is, they had distinct social, political and economic systems and effective law enforcement mechanisms.[17]

This inherent power was recognized in the early treaties and statutes regulating the relationship between the United States and Indian tribes.[18]

16. Commentators have reached consistent conclusions by independent analysis;

> [T]here has never been explicit federal legislation depriving tribal governments of jurisdiction over non-Indians.

Price, *Law and the American Indian* 173 (1973); *Accord*, Clinton (1976), *supra* note 14 at 558.

17. *See, generally*, Llewellyn, *The Cheyenne Way* (1941); Reid, *A Law of Blood* (1970); Clinton (1976), *supra* note 14 at 553.

18. *See* Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 954 (1975).

a. *Early Treaties*

One of the first treaties between the United States and a tribe was the Treaty with the Delawares, 1778, 7 Stat. 13. The treaty (at Article IV) expressly recognized tribal jurisdiction over non-members:

> For the better security of the peace and friendship now entered into by the contracting parties, against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender . . . till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice.

Under Article V of the Treaty with the Wyandot, etc., 1785, 7 Stat. 16, any person settling on tribal lands would "forfeit the protection of the United States, and the Indians may punish him as they please."[19]

In addition to recognizing tribal jurisdiction over non-Indian settlers, many of these early treaties also provided for federal prosecution of Indians and non-Indians for certain crimes committed within the Indian territory.[20] This imposition of federal criminal jurisdiction did not create an exclusive federal jurisdiction. Rather, it established a federal jurisdiction concurrent with the continuing jurisdiction of the tribe. Thus, the language in these early treaties clearly shows congressional recognition of tribal sovereign power over non-Indians on tribal lands.

19. The same or similar language appears in almost all of the early treaties. *See* Treaty with the Cherokee, 1785, Art. V, 7 Stat. 18; Treaty with the Choctaw, 1786, Art. IV, 7 Stat. 21; Treaty with the Chickasaw, 1786, Art. IV, 7 Stat. 24; Treaty with the Wyandot, etc., 1789, Art. IX, 7 Stat. 28; Treaty with the Creek, 1790, Art. VI, 7 Stat. 35; Treaty with the Cherokee, 1791, Art. VIII, 7 Stat. 39; Treaty with the Wyandot, etc., 1795, Art. VI, 7 Stat. 49.

20. *See* Treaty with the Wyandot, etc., 1785, Art IX, 7 Stat. 16; Treaty with the Cherokee, 1785, Art. VI, 7 Stat. 18; Treaty with the Choctaw, 1786, Art. V, 7 Stat. 21; Treaty with the Chickasaw, 1786, Art. V, 7 Stat. 24; Treaty with the Creek, 1790, Art. VIII, 7 Stat. 35; Treaty with the Cherokee, 1791, Art. X, 7 Stat. 39.

b. *Early Statutes*

The 1802 codification of the Indian Trade and Intercourse Act provided for federal prosecution of United States citizens committing crimes on Indian land. 2 Stat. 139 (1802). The Act expressly applied only to lands specifically described by metes and bounds. The Act was amended in 1817, 3 Stat. 383, to further extend federal criminal jurisdiction over Indians on Indian lands, except for offenses by one Indian against another. Furthermore, the 1817 enactment specifically preserved all treaty provisions safeguarding tribal jurisdiction over such matters. This Act, as modified by the Trade and Intercourse Act of 1834, 4 Stat. 729, 733, and by further amendment in 1854, 10 Stat. 270, constitutes (with minor changes) the present 18 U.S.C. §1152.

Petitioners argue that by 1817 the imposition of federal jurisdiction in the early Trade and Intercourse Acts ended any existing tribal jurisdiction over non-Indians. However, this contention is squarely at odds with the terms of subsequent treaties. For example, the Treaty with the Sioune and Oglala Tribes, 1825, Art. 5, 7 Stat. 252, specifically provided for the termination of existing tribal jurisdiction over non-Indians. Such a provision would have been clearly unnecessary if, as Petitioners contend, tribal jurisdiction had already been extinguished. Thus, notwithstanding the existence of the Trade and Intercourse Acts, it was apparently the view of Congress that specifically negotiated

treaty language was necessary to eliminate the continuing concurrent tribal power.[21]

c. *1834 Trade and Intercourse Act*

As the above analysis of the early treaties and statutes and *Worcester v. Georgia, supra* demonstrates, at the time of the passage of the 1834 Trade and Intercourse Act, 4 Stat. 729, both Congress and the Supreme Court agreed that Indian tribes were dependent, quasi-sovereign nations whose original powers could be changed only by treaty or by act of Congress; and that absent such express action, tribes would be free to continue to exercise those powers inherently possessed by any nation.

The legislative history of the 1834 Act, and its companion bills, is instructive in determining the effect of this legislation on tribal powers.

Three bills, comprising a legislative package, were considered by the House Committee on Indian Affairs.[22] The first bill provided for the organization of a Department of Indian Affairs. The second bill revised and made permanent the earlier Trade and Intercourse Acts. And the third bill established the "Western Territory," a territory to be reserved to all Indian tribes within its boundaries, who

21. This analysis is supported by the earliest writing on the subject of jurisdiction over non-Indians. In 1824 Judge Hugh L. White of Tennessee wrote an opinion for the Cherokee Tribe, which was submitted by the tribe to Congress in the form of a Memorial. Vol. 3, *Indian Congressional Documents*, 20th Cong., 2nd Sess. (1828-29), Doc. No. 124. In his opinion, at 8-9, Judge White concluded that the Cherokee Tribe may have given up its criminal jurisdiction over non-Indians through specific treaty stipulations, but noted that the very fact that a treaty on the subject was entered into is evidence of the fact that the tribe did originally have such jurisdiction, and that this jurisdiction was recognized by the United States.

22. The interrelationship of these bills is described in House Report No. 474, 23rd Cong., 1st Sess., June 20, 1934, at 1, [hereinafter cited as House Report].

would join together in establishing a territorial confederated government.

Trade and Intercourse Bill

Section 26 of the Trade and Intercourse Bill[23] provided as follows:

> That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian Country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

House Report at 32.

The House Report states that the purpose of the Trade and Intercourse Bill simply was to *assist* Indian tribes with a major problem then facing them: offenses being committed in their territories by non-Indians. It was recognized that tribal governments then in their early stages, needed *assistance* with non-Indian offenders, since punishment by the traditional family and tribal institutions of justice was not, by itself, clearly equal to the task of adequately punishing non-Indians:

> It will be seen that we cannot, consistently with the

23. This section later became §25 of the Trade and Intercourse Act of 1834 and is now codified, as amended, as 18 U.S.C. §1152 (1970):

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

> provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed *by or against Indians,* of which the tribes have *exclusive* jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, at any place within their own limits. [emphasis added]

House Report at 13.

A careful examination of the interrelationship of this Bill and the Western Territory Bill independently confirms that Congress did not intend that the Trade and Intercourse Bill would extinguish existing tribal jurisdiction over non-Indians.

Western Territory Bill

The Western Territory Bill would have established a territory in a part of the area covered by the Trade and Intercourse Bill. This territory would be governed by a confederation of those Indian tribes resident therein electing to join the confederation. Certain powers relating to strictly intertribal matters would be conferred on the confederation, and a General Council of the involved tribes would assume specified duties.

In fact, the only criminal jurisdiction to be exercised by the confederated government, rather than the member tribes, was: (1) the punishment of Indians fleeing from one tribe to another, and (2) the punishment of Indians of one tribe who commit crimes against Indians of another. This is a jurisdiction not unlike the federal diversity jurisdiction in civil matters.

Except for powers expressly conferred on the confederated government, the member tribes would continue to exercise their own powers. The scheme resembled closely the federal-state system created under the Constitution only 50 years before.

Moreover, federal interference with both the tribal and confederated governments would be minimal:

> The object of this union is to do those things, and those only, which the tribes separately are incompetent to do. The regulations of trade and intercourse among the tribes should be liberal and uniform. . . .

House Report at 19.

The limited nature of the intended interference with tribal self-government is also shown by the following language:

> [A veto power of the Governor over the acts of the territorial council] and the pardon of offenders in capital cases, are the only instances in which the political power of the United States will interfere with that of the tribes, or the confederation.

House Report at 19-20.

The Western Territory Bill did not purport to confer upon the individual tribes any jurisdiction over their own members or over non-Indians. Rather, it in fact recognized and affirmed the existing power of each tribe over all persons within its territory.[24] Furthermore, it purported to limit that power only in two respects.

The Bill[25] provided that governmental employees and representatives, and transients would be under the protection of and subject to the laws of the United States. It

24. §3 of the Act. House Report at 35.
25. House Report at 36.

provided further that if such person were to commit an offense against the law of the tribe, he would be removed from the lands of that tribe by the Governor of the Territory. Thus, non-Indians permanently residing within the tribe's territory would remain subject to the jurisdiction of the tribe. This arrangement is analogous to treaty provisions between the United States and foreign nations which provide for diplomatic immunity for certain United States citizens when on the foreign territory.

The only other language of the Western Territory Bill expressly affecting tribal jurisdiction over non-Indians was:

> [I]n all cases when a person not a member of any tribe shall be convicted of an offense, the punishment whereof by the laws of the tribe shall be death, the judgment shall be forthwith reported to the Governor, who may, for good reasons, suspend the execution thereof until the pleasure of the President shall be known.

House Report at 37.

Moreover, the House Report unequivocally reflected Congress' belief that Indian tribes possessed jurisdiction over non-Indians within their territorial boundaries:

> As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.

House Report at 18.

Furthermore, the Western Territory Bill (at section 3) recognized the right of a tribe to establish and maintain "such government for the regulation of their own internal concerns, as to them may seem proper." The meaning of this section is set forth clearly in the House Report:

> The right of self-government is secured to each tribe, with jurisdiction over *all* persons and property within its limits, subject to certain exceptions, founded on principles somewhat analogous to the international laws among civilized nations. [emphasis added]

House Report at 18.[26]

Legislative History of Bills

In fact, the entire legislative history of the 1834 legislative package demonstrates that Congress intended a pattern of federal and tribal *concurrent* jurisdiction, in addition to a limited jurisdiction for the confederated government of the Western Territory.

The Trade and Intercourse Bill and the Western Territory Bill were envisioned as companion pieces of legislation, functioning in mutual harmony. Section 26 of the Trade and Intercourse Bill (§25 of the Act) would continue to be applicable within the Western Territory. In fact, neither the Trade and Intercourse Bill nor the Western Territory Bill provided that the provisions of the former would not apply in the Western Territory. Moreover, section 13 of the Western Territory Bill specifically provided that the trade and intercourse between the United States and the Indian tribes would continue to be regulated by the Trade and Intercourse Laws.

As demonstrated below, it is quite clear from the legislative history that the Western Territory tribes would retain criminal jurisdiction over non-Indians *concurrent* with the federal jurisdiction assumed by the United States under the Trade and Intercourse Act. Accordingly, it cannot success-

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26. This legislative history shows that the "internal concerns" of an Indian tribe encompass all persons and property within its limits." It is not limited merely to matters in which only Indians are involved.

fully be argued that the effect of the Trade and Intercourse Act was to oust tribal jurisdiction over non-Indians.

That federal jurisdiction over non-Indians would be concurrent with existing tribal jurisdiction is demonstrated in the supporting documents appended to the House Report. The bills in large measure tracked the recommendations in the written report of the Commissioners of Indian Affairs to the Secretary of War, dated February 10, 1834.[27] That report is redolent with alarms about the evils visited by unprincipled whites living and sojourning with them and the necessity for the exercising of jurisdiction by the tribes over resident non-Indians. Their report supports the concept of concurrent administration of law by the United States and the tribes themselves:

> *Residence of White Men*
>
> If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men. Some have eluded the pursuit of justice, and located themselves here, where they fancy themselves free from punishment for the past, and without restraint for the future.
>
> Already a jealousy exists between the citizens and red men, although connected by conjugal ties; and while the Indians must be permitted to marry if they choose citizens of the United States, yet these citizens need not be recognized as Indians, or encouraged to settle in the Indian country; *nor ought these citizens, while sojourning with the red man, to be protected from the full operation of the Indian laws, however severe.*
>
> • • • •
>
> *Organization of the Territory*
>
> Before the organization of the Indian Territory is proposed, it may be proper to advert again to the situa-

27. Documents "S" and "T" appended to the House Report.

> tion of the red men, both indigenous and emigrant: the former have always enjoyed their own laws and customs; the latter have left their residence within the States, to find a home beyond the municipal regulations of white men, while Government has reserved a constitutional supervision over all her red children. She has solemnly guarantied protection of life and property to every tribe who removes here, and given an assurance that no State or Territory shall exercise jurisdiction over them. *Hence, intercourse laws are necessary; they may be made so energetic, too, as to deter offenders, be they either citizens of the United States or individuals of another tribe. All this may be done without impairing in the least the independence of a tribe within its own limits.*
>
> *Within these limits . . . the municipal laws of the tribes may be enforced; and, should the laws of the tribes and the laws of the United States give concurrent remedies, this would create no difficulty. It is, indeed, desirable to encourage the several tribes to adopt salutary laws, as far as possible, and render less frequent the intervention of Government.* . . . [emphasis added]

House Report at 98,100.

This view—that the Western Territory Bill did not *create* tribal power but merely *limited* it and provided for a confederated government to deal with certain issues among the tribes and the United States—is supported by the debates in Congress regarding the Bill. Representative Everett noted that section 3 of the Bill was intended "to secure and perpetuate the right of self-government, so far as related to the tribes themselves" rather than to *create* such a right.[28] He assured the objecting members that the Bill "contained nothing which went to touch, in the slightest degree the rights of the tribes, as to their own con-

28. 10 Conc. Deb. 4764 (1834).

cerns."[29] He noted that section 9 providing for review by the Territorial Governor of all capital cases was a "restriction on the natural rights of the Indians, but one which was expedient and necessary."[30]

Representative Wayne stated that the limited purpose of the Bill was to give Indian tribes:

> an opportunity of entering, if they considered it most for their interest to do so, into a confederacy for their mutual advantage, to prevent the recurrence of private wars and civil feuds and strifes among themselves, and thereby to obviate the necessity of any forcible interposition of the power of the United States in their concerns. This was the whole end and scope of the bill.

Ultimately, in 1834 the Trade and Intercourse Bill and the Department of Indian Affairs Bill were enacted into law. However, the Western Territory Bill was tabled for further consideration at the next session of Congress. But, it was never enacted into law, though revised versions of it were resubmitted from time to time.[31] Whatever reasons may be given for the failure of the Western Territory Bill, it does not appear that concern about tribal jurisdiction over non-Indians played any significant role. The reasons for its failure were varied and numerous, among them objections to certain despotic aspects of the form of government proposed for the Territory noted by Rep. Adams; blatant appeals to racism by Rep. Archer of Virginia; and questions as to the amount of territory to be encompassed

29. *See* discussion at note 26, *supra* regarding the meaning of these "concerns".

30. 10 Cong. Deb. 4767 (1834).

31. *See* Gittinger, *The Formation of the State of Oklahoma*, (Univ. of Oklahoma Press, 1939) for a history of these Bills and Indian tribal resistance to them.

within the Western Territory noted by Rep. Wayne.[32]

Whatever else may be said of the Trade and Intercourse Act of 1834 it cannot be said that the failure of Congress to enact the Western Territory Bill into law converted the Trade and Intercourse Act into a "preemption" statute. That Act was conceived in Committee as recognizing concurrent jurisdiction and was debated in Congress in that same context. And, as enacted, section 25 of the Act is fully compatible with the exercise of tribal jurisdiction over those matters covered by its provisions.

Finally, it must be observed that Petitioners' thesis—that the language of the 1834 Act must be read as extinguishing all criminal jurisdiction of the tribe, except the expressly reserved jurisdiction over "crimes committed by one Indian against the person or property of another Indian"—leads to a result which even Petitioners would reject. Under such an analysis, the criminal jurisdiction assumed by the United States under the 1834 Act was exclusive, extinguishing tribal jurisdiction. However, this federal assumption of jurisdiction included within its coverage crimes by tribal members against non-Indians. Thus,

32. *See* 10 Cong. Deb. 4768-79 (1834). Representative John Quincy Adams did object to the idea that a section of the Bill would create "double jurisdiction" in that one act may be an offense against the "laws of the United States and the laws of the Indians." *Id.* at 4771. However, Representative Adams was wrong since that section did not involve double jurisdiction. He was referring to section 8 of the Bill which provided that representatives of the United States and temporary sojourners through the Indian territory would be subject to the laws of the United States. If such person would commit an offense against the laws of the United States, he would be prosecuted for it. If, however, such person committed an offense against the laws of an Indian Tribe, it would be grounds for removal by the Territorial Governor, not prosecution. This analysis is supported by the House Report (at 18), and section 8 was to be regarded as a limitation on existing tribal authority "somewhat analogous to the international laws among civilized nations." House Report at 18.

Petitioners' analysis must lead to the conclusion that subsequent to the 1834 Act, a tribe no longer possessed power to punish *its own members* for such criminal activity—a conclusion which even Petitioners would surely reject.

d. *Post-1834 Statutes and Treaties*

The foregoing analysis is confirmed by several post-1834 congressional actions demonstrating: (1) that it was the view of Congress that tribal jurisdiction was not affected by the 1834 Act; and (2) that unless there is an express termination of tribal jurisdiction, any assumption of federal jurisdiction is concurrent only.

In 1854 Congress amended the Trade and Intercourse Act.[33] However, had the 1834 Act totally preempted tribal jurisdiction over the covered matters—such as crimes by Indians against whites—the 1854 amendment would not have been necessary. That amendment barred federal prosecution of Indians for such crimes if they had already been punished by the tribe. The amendment confirms that tribal jurisdiction continued to exist in matters over which federal jurisdiction was extended by the 1834 Act.[34]

In 1855, the Treaty with the Choctaw and Chickasaw, 11 Stat. 611, was executed. However, the notion that the 1834 Act extinguished the concurrent tribal jurisdiction over non-Indians cannot be reconciled with the following language in Article 7 of that treaty:

> So far as may be compatible with the constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; *excepting, however, all persons with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe.* . . . [emphasis added]

33. §3 of the Act of March 27, 1854, 10 Stat. 269, 270.

34. See additional discussion of 1854 Act, *infra*.

The emphasized language would be mere surplusage if, as Petitioners' contend, such jurisdiction had already been extinguished in 1834.[35]

Finally, in 1885, Congress enacted the Major Crimes Act.[36] That Congress understood the necessity of expressly terminating tribal jurisdiction in order to make federal jurisdiction exclusive is clearly seen in the history of that Act.

In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that the federal government did not have jurisdiction to try an Indian for the murder of another Indian in Indian country. Crow Dog had been tried and

35. It is noteworthy that even the specific language of this treaty was not deemed sufficient to prevent the Chickasaws from taxing the persons and the property of local non-Indians. *Morris v. Hitchcock*, 194 U.S. 384 (1904), *Aff'g.* 21 App. D.C. 565 (1903). The Appellate Court in *Morris*, affirmed by the Supreme Court, stated:

> Where the restriction upon this exercise of power by a recognized government, is claimed under the stipulations of a treaty with another, whether the former be dependent upon the latter or not, it would seem that its existence ought to appear beyond a reasonable doubt. We discover no such restriction in the clause of Article 7 of the Treaty of 1855, which excepts white persons from the recognition therein of the unrestricted right of self-government by the Chickasaw Nation, and its full jurisdiction over persons and property within its limits. The conditions of that exception may be fully met without going to the extreme of saying that it was also intended to prevent the exercise of the power to consent to the entry of non-citizens, or the taxation of property actually within the limits of that government and enjoying its benefits.

21 App. D.C. at 593-94.

36. 23 Stat. 385 (1885), now codified, as amended, at 18 U.S.C. §1153 (1970).

convicted by tribal authorities, and the traditional penalty of support of the decedent's family was imposed. In response to this case, Congress passed the Major Crimes Act to provide for federal jurisdiction with respect to certain enumerated Indian vs. Indian crimes.

The first version of the Major Crimes Act was introduced on the floor of the House of Representatives in 1885 as an amendment to the Indian Appropriations Bill. As originally presented, it read in part as follows:

> Sec. 10. That immediately upon and after the passage of this act all Indians within the provisions of this act committing against the person or property of another Indian any of the following crimes . . . shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner *and not otherwise* and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively. [emphasis added]

16 CONG. REC. Pt. II at 934 (1885).

At the suggestion of Rep. Budd, this amendment was modified so as to delete the words "and not otherwise," in order to avoid stripping tribal courts of concurrent jurisdiction.

> MR. BUDD. I desire to suggest another modification of the amendment—to strike out the words "and not otherwise." The effect of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunals of the Indian country. I think it sufficient that the courts of the United States should have concurrent jurisdiction.

16 CONG. REC., *supra* at 934.

There was no debate on the modification proposed by Rep. Budd, but the amendment was adopted by the House in the modified form.

This legislative history demonstrates that when Congress intends to strip away tribal jurisdiction, it does so with *express* language, and not by implication. Petitioners' position—that in 1834 Congress *impliedly* extinguished tribal jurisdiction—is flatly at odds with this rule.

Moreover, this is in fact but an example of an analogous principle of dual governmental authority: when federal jurisdiction is extended into an area traditionally subject as well to state or local jurisdiction, that federal jurisdiction is considered concurrent with continuing state or local jurisdiction, unless Congress expressly provides otherwise. Thus, in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946), this Court stated:

> Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . .

Similarly, in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962), this Court declared:

> Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.

And, it was noted that this Court has been consistently disposed:

> to affirm the [continuing state] jurisdiction, where it is not excluded by express provision, or by incompati-

> bility in its exercise arising from the nature of the particular case.

368 U.S. at 508.

Finally, this principle applies fully to criminal matters, the particular subject of the instant cases:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

United States v. Lanza, 260 U.S. 377, 382 (1922), quoted in *Abbate v. United States*, 359 U.S. 187, 194 (1959).

e. *Petitioners' Authorities Do Not Show a Termination of Tribal Authority Over Non-Indians*

1854 Amendment

The only congressional enactment after 1834 urged by Petitioners as a recognition of the termination of inherent tribal jurisdiction over non-Indians is the 1854 Amendment to the 1834 Trade and Intercourse Act.

In 1854, section 25 of the Trade and Intercourse Act was modified to eliminate the possibility that an Indian subjected to tribal discipline could also be tried in federal court.[37] Petitioners argue that the 1854 Congress' failure to provide similar protection to *non-Indians* subjected to tribal discipline confirms that tribes lack power to punish non-Indians. Since there is no legislative history of the 1854 Amendment supporting Petitioners' argument,[38] Petitioners

37. §3 of the Act of March 27, 1854, 10 Stat. 270.

38. As the Ninth Circuit noted in its opinion (544 F.2d at 1010n.3) the 1854 Amendment was disposed of rapidly with little debate.

suggest that this Court merely *infer* such a conclusion. However, such an inference would ignore the facts and circumstances surrounding and giving rise to the 1854 Amendment.

First, the limited debate on the floor of the House[39] reveals that a particular case prompted the amendment. That case involved a Creek Indian who had already been prosecuted by his tribe. Thus, the question of double-jeopardy for *Indians* was the *only* matter directly before Congress at that time.

Secondly, as shown in the House Report on the Trade and Intercourse Act of 1834,[40] Congress assumed jurisdiction over Indians reluctantly. In fact, so long as Indian tribes were willing to exercise jurisdiction over their own members, there was no federal policy requiring federal intervention. Moreover, the policy of Congress was clear: the federal government would gladly subordinate its jurisdiction to that of the tribe in the punishment of tribal members.

But, such was not the case with non-Indian offenders. The federal government was greatly concerned that offenses by non-Indians against Indians would harm the uneasy relationship between the tribes and the United States. Thus, federal policy was to take the lead in prosecuting non-Indian offenders, without disturbing the continuing existence of concurrent tribal authority over the same individuals.

Finally, and perhaps most importantly, by 1854, the tribes as a matter of general *practice* deferred to the federal

39. 23 Cong. Globe 700-701 (1854).

40. House Report at 13.

authorities in the prosecution of non-Indians. This practice was a natural result as the Department of Indian Affairs became entrenched in Indian territories and took over the administration of Indian activities pursuant to treaties. The functioning of tribal government was impaired.[41] Thus, tribal prosecution of non-Indians was probably rare. It is reasonable, therefore, to assume that Congress would deal with the only jurisdictional problem that had come to its attention, namely, the Indian double jeopardy question.

Attorney General Opinions, Kenyon and Mayfield

Petitioners' failure to identify any congressional action—whether treaty or statute—terminating the original power of Indian tribes over non-Indians has already been demonstrated. It will now be shown that Petitioners' remaining arguments, which are based on *administrative* interpretations and *judicial* decisions, in fact provide no reliable support for Petitioners' position.

Petitioners' administrative and judicial authorities consist of: (a) two antiquated opinions of the Attorney General—an 1834 Opinion[42] and an 1855 Opinion;[43] (b) two easily distinguishable early cases—the 1878 circuit court decision *Ex parte Kenyon*[44] and the 1891 decision of this Court *In re Mayfield;*[45] and (c) a 1970 opinion of the Solicitor of the Department of the Interior based on *Kenyon* and the Attorney General Opinions, which was subsequently withdrawn by the Solicitor.[46]

41. *See* discussion in *Final Report of the American Indian Policy Review Commission*, Vol. 1 at 148, 162 (1977).
42. 2 Op. Atty. Gen. 693 (1834).
43. 7 Op. Atty. Gen. 174 (1855).
44. 14 F. Cas. 353 (C.C.W.D. Ark. 1878).
45. 141 U.S. 107 (1891).
46. 77 I.D. 113 (August 10, 1970), withdrawn January 25, 1974.

(1) The 1834 and 1855 Opinions of the Attorney General

Both the 1834 and 1855 Attorney General Opinions deal with the jurisdiction over non-Indians of the courts of the Choctaw Tribe. The 1834 Opinion deals with criminal jurisdiction; and the 1855 Opinion deals with civil jurisdiction. Each Opinion rests on interpretations of the provisions of a Choctaw Treaty[47] and federal law regarding jurisdiction over non-Indians in Indian Country.

In fact, the two Opinions reach different conclusions regarding the inherent power of tribes to exercise jurisdiction over non-Indians. In the 1834 Opinion, Attorney General Butler asserted that tribes could not exercise any form of jurisdiction over a United States citizen, arguing that submission to tribal court jurisdiction would in some way impair the obligations of that non-Indian to the federal sovereign.[48] There is, in fact, no explanation for Attorney General Butler's mysterious reasoning that amenability to a tribe's penal laws would in some manner reduce an individual's allegiance to the United States.

Subsequently, in the 1855 Opinion, Attorney General Cushing rejected that major premise of the 1834 Opinion. He held that a citizen of the United States could most certainly become subject to tribal jurisdiction:

> But the error in all this consists in the idea that any man, citizen or not citizen, becomes divested of his allegiance to the United States, or throws off their jurisdiction or government, in the fact of becoming subject to any local jurisdiction whatever. This idea misconceives entirely the whole theory of the Federal Government, which theory is, that all the inhabitants

47. Treaty of Dancing Rabbit Creek, 1830, 7 Stat. 333.
48. 2 Op. Atty. Gen. at 694-695.

> of the country are, in regard to certain limited matters, subject to the federal jurisdiction, and in all others to the local jurisdiction, whether political or municipal.[49]

Furthermore, the 1834 Opinion proceeded on yet another baseless supposition. The Attorney General surmised that, in enacting the 1834 Trade and Intercourse Act, Congress was:

> evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves. . . .[50]

He then reasoned that the 1834 Act was enacted to fill that assumed jurisdictional vacuum. However, Respondents have already demonstrated, *supra* that no such jurisdictional vacuum existed and that the 1834 Congress did not assume the existence of such a void. Unfortunately, however, the invalidity of Attorney General Butler's 1834 supposition was compounded in 1855, when Attorney General Cushing uncritically embraced it.

Finally, the 1834 Opinion relies on a provision peculiar to the involved treaty. Specifically, language (in Article IV) by which the Choctaws expressed a wish that Congress would "grant" them the rights to punish white men by their own laws. In light of Respondents' early treaty and statutory analysis, *supra* this "request" is incongruous and certainly ambiguous. A likely inference is that it was the result of uninformed and misleading representations made to the Choctaws by the treaty negotiators. The involved treaty language appears in no other treaty.

Thus, once again, the 1855 Opinion simply accepted an erroneous element of the 1834 Opinion's analysis. However,

49. 7 Op. Atty. Gen. at 177-178.
50. 2 Op. Atty. Gen. at 695.

in this instance it led to a proper result, namely a conclusion that the tribe possessed civil jurisdiction over non-Indians. Noting that the treaty is "absolutely silent on the question of civil jurisdiction,"[51] the Attorney General then held that the Choctaw therefore possessed civil jurisdiction over non-Indian matters within their territory:

> By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.[52]

It is noteworthy that the analysis employed by the Attorney General in 1855—that a tribe possesses those of its inherent powers not expressly extinguished by treaty or statute—is precisely the analysis urged by Respondents and used by the Ninth Circuit in its decision below. Consequently, absent the erroneous guidance given by the 1834 Opinion, it is probable that the Attorney General in 1855 would have recognized the continuing existence of tribal criminal jurisdiction over non-Indians.

(2) Ex parte Kenyon and In re Mayfield

The circuit court in *Ex parte Kenyon*, 14 F. Cas. 353 (C.C.W.D. Ark. 1878) held that the Cherokee Courts could not exercise criminal jurisdiction over a non-Indian. That conclusion was also erroneously based on the supposition that the 1834 Trade and Intercourse Act had extinguished such jurisdiction. Furthermore, the Court noted that there were two reasons for the Cherokee Tribe's lack of jurisdiction over the defendant:

1. The act of conversion being complained of took place *outside the reservation.*

51. 7 Op. Atty. Gen. at 180.
52. 7 Op. Atty. Gen. at 180-181.

2. The defendant was not an Indian.

Moreover, the court stated in its Opinion that the first ground was itself dispositive. Subsequently, in *Elk v. Wilkins*, 112 U.S. 94 (1884), this Court agreed, stating:

> In *Kenyon's Case*, Judge Parker held that the court in which the prisoner had been convicted had no jurisdiction of the subject matter, because the place of the commission of the act was beyond the territorial limits of its jurisdiction, and, as was truly said, "this alone would be conclusive of this case."

112 U.S. at 108.

Thus, *Kenyon* did not in fact pass on the issue before this Court: whether a tribe possesses criminal jurisdiction over non-Indians committing offenses *on the reservation*.

In re Mayfield, 141 U.S. 107 (1891) is the only other case cited by Petitioners as direct support for the proposition that there is no tribal jurisdiction over non-Indians. It is argued that *Mayfield* holds that the 1834 Trade and Intercourse Act restricted tribes to jurisdiction over Indians only. However, this is a clear misreading of this Court's opinion. The "statutes" the "general object" of which is discussed in the opinion[53] decidedly do *not* include the 1834 Trade and Intercourse Act. Rather two *other* acts, each dealing with criminal jurisdiction in the Cherokee territory, were interpreted by this Court.[54]

One of those acts,[55] this Court noted, contained the following language providing that the Indian tribes would:

> "'retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the

53. 141 U.S. at 116.

54. Act of March 1, 1889, 25 Stat. 783, and Act of May 2, 1890, 26 Stat. 81.

55. Act of May 2, 1890, §30, 26 Stat. 81.

> nation by nativity or by adoption shall be the *only* parties." [emphasis added]

141 U.S. at 115.

Moreover, both of these acts abrogated the Treaty with the Cherokee Nation, 1866, 14 Stat. 799 which had provided (in Article XIII) that the Cherokee courts would:

> retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, *or where the cause of action shall arise in the Cherokee Nation* . . . [emphasis added]

114 U.S. at 113.

Thus, the two acts involved in *Mayfield* (1) dealt specifically with the territory of Oklahoma; and (2) *expressly* limited Cherokee jurisdiction to tribal members only, deleting the additional jurisdiction retained under the prior treaty. Accordingly, Petitioners attempt to characterize the language of *Mayfield* regarding jurisdiction over non-Indians as a general statement of federal Indian law is simply invalid.

(3) The 1970 Opinion of the Solicitor of the Department of the Interior

The 1970 Solicitor's Opinion[56] is founded exclusively on the 1834 and 1855 Attorney General Opinions and *Kenyon*. Thus, for the reasons discussed above, the Solicitor's Opinion lacks a sound analytical foundation. Presumably, realization of this prompted its withdrawal in 1974.

Finally, it is regrettable that this defective progression of Attorney General Opinions, cases, and Solicitor's Opinion caused the committees of Congress to embrace the legal conclusions reflected in the legislative histories of the

56. 77 I.D. 113 (August 10, 1970).

1960 and 1970 enactments discussed in briefs of Petitioners and *amici*.[57] This classic example of the dangers of legal bootstrapping would in fact not have occurred had the Solicitor or the Congressional committees critically examined these "authorities." However, minimal weight should be given the views of those Congressional committees regarding interpretation of the early federal jurisdictional acts:

> [T]he views of one Congress as to the construction of a statute adopted many years before have "very little, if any, significance." [citations omitted]

U.S. v. Southwestern Cable Co., 392 U.S. 157, 170 (1968).

3. The Treaty of Point Elliott Did Not Extinguish the Suquamish Tribe's Authority Over Non-Indians.

An examination of the facts and circumstances surrounding enactment of the 1855 Treaty of Point Elliott, 12 Stat. 927,[58] and of the terms of the adopted treaty reveals the following:

57. Pet. Brief at 114. Brief for Amicus Curiae Kitsap County at 50, 56; Brief for the State of South Dakota *et al.* as Amici at 22.

58. The materials evidencing the history of the Treaty are contained in microfilm rolls of the records of the Federal Government in the National Archives, relating to the Washington Superintendency of Indian Affairs. These materials constitute the legislative history of this statute, which, of course, may be judicially noticed. *Territory of Alaska v. American Can Co.*, 358 U.S. 224 (1959). The court may consider the historical setting from which the statute arose to determine congressional intent. *The Delaware*, 161 U.S. 459, 474 (1896); *Platt v. Union Pacific R.R.*, 99 U.S. 48, 67 (1878). In fact, in determining the intent of acts and treaties involving Indian tribes, the "surrounding circumstances" and "legislative history" are to be accorded paramount weight. *DeCoteau v. District County Court*, 420 U.S. 425, 444-45 (1975). Included in such "circumstances" are the instructions to the treaty commissioners. *Citizens Band of Potawatomi Indians v. United States*, 391 F.2d 614, 619 (Ct. Cl. 1967). Certified copies of the above-referenced materials are reproduced in the Appendix to Respondents' Brief, which also includes a verbatim transcript for the Court's convenience.

(1) The federal government in *1854*—20 years after enactment of the 1834 Trade and Intercourse Act—believed that express treaty language was necessary to divest the Suquamish Tribe of criminal jurisdiction over non-Indians;

(2) Such treaty language was sought by the treaty commissioners but not obtained in the treaty negotiation; and

(3) The approved treaty did not contain language extinguishing the Tribe's jurisdiction over non-Indians.

This examination will be conducted in light of the cardinal rule:

> [T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.

United States v. Winans, 198 U.S. 371, 381 (1905).

a. *The Proposed Treaty Provisions*

On August 30, 1854, Acting Commissioner of Indian Affairs Charles Mix by letter requested Isaac Stevens, Governor of the Washington Territory, to negotiate treaties with the Indian tribes in the Washington Territory.[59] Although Mix gave Stevens no *specific* instructions as to the details of the treaties, he did enclose the treaties recently concluded with the Rogue River Tribe and Cow Creek Band in Oregon and with the Omaha and Ottoe and Missouria Tribes. Mix advised Stevens that those treaties contained provisions recommended for use in the Washington Territory negotiations, pointing out that they reflected the policy of the government regarding the matters covered.

59. National Archives, Microcopy No. 5, Roll No. 7, Records of the Washington Superintendency of Indian Affairs, Letters from the Commissioner of Indian Affairs, 1853-59 (pages A-1-12 *infra*.)

Approximately three months later, the Washington Territory Treaty Commissioners met at Olympia, Washington, discussed the above treaties, and directed Treaty Commissioner Gibbs, a lawyer, "to prepare a programme of a Treaty in accordance with the views of the Commission."[60]

Three days later, the Commission met again and adopted a proposed form of treaty "as the basis of the Treaties to be held with the Tribes upon the [Puget] Sound and the Pacific Coast. . . ."[61] This proposed form of treaty contained fourteen articles. In particular, Article VIII covered criminal offenses by or against non-Indians:

> The United States also to indemnify the Indians for horses stolen by the whites.
>
> Citizens of the United States may safely pass through their reserve. . . . *Injuries committed by whites towards them not to be revenged, but on complaint being made they shall be tried by the Laws of the United States and if convicted the offenders punished.* Injuries by Indians to whites to be in like manner prosecuted and punished according to law.
>
> Every tribe to be responsible for offenses committed by its people or by others in their lands. Chiefs in the first instance to be looked to and required to deliver up criminals at once—to be in return supported in the exercise of their lawful authority by the Government. [emphasis added]

Offenses by tribal members were covered by Article XII:

> Tribes may punish offenders of their own Tribe for any offense committed, according to their laws, a majority of the Chiefs forming a court for the trial of all offenders.

60. *Records of the Proceedings of the Commission to hold Treaties with the Indian Tribes in Washington Territory and the Blackfoot Country*, National Archives, Microcopy No. 5, Roll No. 26, Records of the Washington Superintendency, 1853-74, Records relating to Treaties, 1854-63 (pages A-14, 18 *infra.*).

61. *Id.* (pages A-14-22 *infra.*).

It is quite clear, then, that under the proposed treaty provisions, the Suquamish Tribe would have relinquished jurisdiction to the United States as to offenses committed by or against non-Indians, and would have retained only its jurisdiction over strictly Indian offenses. Thus, some 20 years after the enactment of the 1834 Trade and Intercourse Act, it was the view of the federal government that the Washington Territory tribes, including the Suquamish, possessed criminal jurisdiction over non-Indians.

b. *The Language of the Approved Treaty*

Approximately six weeks later, the Treaty of Point Elliott was signed.[62] Without a doubt, the Treaty is derived directly from the proposed form of treaty described, *supra.* All of the provisions of the approved Treaty (except the extradition provision discussed below) correspond to comparable provisions in that proposed form. Significantly, the *only* provisions of the proposed form *not* incorporated in the approved Treaty were the above-quoted criminal jurisdiction provisions.[63]

Admittedly, there is no evidence expressly indicating the reasons for the deletion of the proposed criminal jurisdiction provisions. However, since those provisions were the only provisions not included, it is quite clear that their absence may not be attributed to inadvertance. Rather,

62. In the Agreement of May 28, 1904 (ratified by Congress in 1905 (33 Stat. 1078) the Suquamish ceded to the United States approximately 48 acres of reservation land for eventual use as a military site. This Agreement reserved to the Tribe "any benefits" to which they were entitled under previous treaties or agreements. The Treaty of Point Elliott is the only other treaty or agreement between the United States and the Tribe.

63. It is noteworthy that while the above-quoted criminal jurisdiction provisions of Article VIII of the proposed form were deleted, all other provisions of that Article VIII *were* incorporated in the approved Treaty.

the most logical conclusion is that, during the period between the adoption of the proposed form of treaty and the signing of the approved Treaty, it became apparent that termination of the Tribe's jurisdiction over offenses by or against non-Indians could not be secured.

Furthermore, the *only* language in the approved Treaty relating to criminal matters is in Article IX:

> And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

This language in fact constitutes nothing more than an extradition provision:[64] an agreement by the Tribe that it will not give sanctuary to fugitives from federal authority. By no stretch can it be properly characterized as a relinquishment of tribal criminal jurisdiction over non-Indians. As indicated above, the proposed form of treaty contained explicit language which concededly would have extinguished such tribal jurisdiction. However, this language was not adopted. It is clearly not reasonable, therefore, to construe the oblique extradition provision as accomplishing by implication the very purpose expressly embodied in the rejected language.

This becomes even clearer when the Point Elliott extradition provision is compared with the extensive provisions regarding criminal jurisdiction of other treaties of that period. *See, e.g.*, Treaty with the Choctaw and Chickasaw, 1855, Art. 7, 11 Stat. 611, 612-13; Treaty with the Cow

64. In *State ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970), the Ninth Circuit construed the comparable "deliver up" provision of the Treaty with the Navajo, 1868, Article I, 15 Stat. 667:

> These provisions recognized a jurisdiction in the Navajo Tribe over intersovereign rendition, at the time the relationship between the United States and the Tribe was originally defined.

Creek Band, 1853, Art. 6, 10 Stat. 1027, 1028.

Finally, the extradition provision in the Treaty is arguably applicable to all "offenders," both Indian and non-Indian. If, as Petitioners would argue, this provision divested the Suquamish Tribe of jurisdiction over such "offenders," then it must also have divested the Tribe of jurisdiction over *its own members*, a conclusion even Petitioners would reject.

In conclusion, Respondents submit that this treaty history reveals that the Treaty of Point Elliott not only did *not* diminish the Tribe's criminal jurisdiction, but in fact preserved and secured it.[65]

4. Decisions of This Court Affirm Tribal Authority Over Non-Indians on All Lands Within the Reservation, as to Matters in Which There Is a Sufficient Tribal Interest. Such a Sufficient Tribal Interest Exists in These Cases.

There is a significant body of case law, which includes two recent decisions of this Court, regarding the authority of an Indian tribe to regulate non-Indians with respect to their on-reservation activities. In sum, this body of law

65. It is the position of Respondents that it is sufficient to conclude that the Tribe retained concurrent jurisdiction over matters for which there is also federal jurisdiction.

However, the Solicitor General (Brief for the United States as Amicus Curiae at 36 *et seq.*) makes the following argument: In 1854, the Trade and Intercourse Act was amended to exclude the following cases from the reach of federal criminal jurisdiction in Indian country:

> any case where, by treaty stipulations, the exclusive jurisdiction over such offenses may now or hereafter be secured to said Indian tribes respectively.

10 Stat. 270. (Now codified at 18 U.S.C. §1152.)

This reinstated the "treaty" provision which had originally appeared in the 1817 Trade and Intercourse Act. The Solicitor General argues that the language of the Point Elliott Treaty contains such "stipulations" and that the Suquamish Tribe retained exclusive jurisdiction under this provision.

confirms the existence of such authority manifested in such areas as taxation, civil disputes and regulation of liquor.

Moreover, this case law disposes of the following ancillary issues: (1) whether tribal jurisdiction is dependent on the status—fee or trust—of the specifically involved reservation land; and (2) whether it is legally material that the non-Indian is disentitled to membership and political participation in the tribe. Both these questions are answered in the negative.

a. *Early Cases*

The first major decision to deal with the challenge of tribal authority over non-Indians on the reservation was *Morris v. Hitchcock,* 194 U.S. 384 (1903). This was a suit brought by non-Indians challenging an ordinance of the Chickasaw Nation which assessed a tax on non-Indians grazing cattle within the limits of the reservation. This Court relied principally on the treaties made with the Tribe which gave the Tribe the right to control the presence of non-members in its territory, and concluded that under these treaties, the Chickasaw Nation had the power to attach conditions to the presence of non-members within its borders. Accordingly, this Court upheld the tribal tax.[66]

The following year, the Eighth Circuit decided *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906). It held that the Creek Nation had power to tax non-Indians conducting business within the reservation, even though the business was conducted on lands owned by them in fee. The court held that the

66. A comparable provision is present in the Treaty of Point Elliott, Art. II, App. Pet. Brief at 8a.

Tribe's power to tax was not affected by the taxpayer's ownership or non-ownership of his land, nor by the existence of cities or towns within the reservation. Furthermore, the court rejected the notion that the applicable allotment acts, which expressly authorized non-Indians to enter and reside on the reservation, somehow divested Indian tribes of their power to tax non-Indians conducting businesses within their borders:

> It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. . . . The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek Tribe itself.

135 F. at 950. This power of the tribe to tax all persons within its boundaries has been repeatedly upheld in subsequent court decisions. *Barta v. Oglala Sioux Tribe,* 259 F.2d 553 (8th Cir. 1958); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956).

b. *Jurisdiction and Land Status*

The argument that tribal jurisdiction is dependent on the status—fee or trust—of the specifically involved reservation land, is also dealt with by the Eighth Circuit in *Buster v. Wright, supra*:

> The theory that the consent of a government to the incorporation and existence of cities upon its territory or to the conveyance of the title to lots or lands within it to private individuals exempts the inhabitants of such cities and the owners or occupants of such lots from the exercise of all its governmental powers,

> while it leaves the inhabitants of other portions of its country subject to them, is too unique and anomalous to invoke assent.

135 F. at 952.

Moreover, this argument—that jurisdictional power within the reservation turns on land status—was rejected quite firmly in recent decisions of this Court. In *United States v. Mazurie*, 419 U.S. 544 (1975) the defendant non-Indians argued that the Wind River Tribes had no valid authority to regulate defendants' liquor business, which was conducted on fee land within the Wind River Reservation. The assertion that the fee status of the land was jurisdictionally-significant was unequivocally rejected. *Id.* at 553-55. In doing so, this Court relied on *Seymour v. Superintendent*, 368 U.S. 351 (1962), which held that Congress has in fact not distinguished between fee and trust land in its statutory formulation of Indian jurisdiction.

More recently, in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), it was once again urged that the fee/trust distinction has jurisdictional significance— in this case, with respect to a state's taxing authority on the reservation. The argument was once more rejected, in reliance on both *Seymour* and *Mazurie*, and on the severe practical difficulties imposed on law enforcement by a checkerboarded jurisdictional scheme:

> We concluded [in *Seymour*] that "[s]uch an impractical pattern of checkerboard jurisdiction," ibid., was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. See also United States v. Mazurie, 419 US 544, 554-555 (1975).
>
> • • • •
>
> Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard"

> approach within an existing Indian resevation, and our cases have in turn followed Congress' lead in this area.

425 U.S. at 478, 479.[67]

Finally, surely the message of *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) and *Rosebud Sioux Tribe v. Kneip*, ... U.S. ...., 97 S.Ct. 1361 (1977), is that ultimately tribal political jurisdiction extends over *all* land contained within the true boundaries of the reservation. That is, where Congress has desired to relieve non-Indian entrants or their lands from that political jurisdiction, it has done so by express action calculated to alter the reservation boundaries, not the tribal power. No such action can be shown in these cases.

c. *Williams v. Lee*

In *Williams v. Lee*, 358 U.S. 217 (1959) this Court dealt with jurisdiction over a civil dispute between an Indian and a non-Indian arising from an on-reservation business transaction. This Court held that such jurisdiction properly rests in tribal court, rather than state court:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. *It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there.* [citations omitted] The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Nava-

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67. If, as Petitioners contend, jurisdiction should be a function not only of land status, but of tribal affiliation as well, then all law enforcement officers on the reservation would need not only a "tract book" (*Moe*, 425 U.S. at 478), but also a genealogical chart.

> jos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. [emphasis added]

358 U.S. at 223.

In its decision this Court relied on the scope of tribal court criminal jurisdiction. It acknowledged that state courts have been allowed to try on-reservation non-Indian vs. non-Indian crimes. Significantly, however, the Court then went on to declare:

> But if the crime was *by or against an Indian*, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.
>
> [emphasis added.]

358 U.S. at 220, quoted with approval in *McClanahan v. Arizoa Tax Commission*, 411 U.S. 164, 171 (1973).

Moreover, in reaching this conclusion, this Court analyzed treaty provisions—comparable to those in Article II of the Treaty of Point Elliott—setting apart a reservation for the exclusive use of the Navajo Tribe:

> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.

358 U.S. at 221.[68]

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68. It is noteworthy that the language in the involved Treaty with the Navajo, 1868, Art. 1, 15 Stat. 667, dealing with offenses by non-Indians against Indians *explicitly* grants jurisdiction over such matters to the *federal government*. Nevertheless, this explicit language did not prevent this Court in *Williams* from determining that it did not matter that "respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there." It is significant that no such cession of Tribal jurisdiction appears in the Treaty of Point Elliott making the *Williams* rationale all the more compelling in the instant case.

In addition, *see* notes 26, *supra*, 79 *infra* for examination of the meaning of "internal affairs."

The facts of the present case fit squarely within the *Williams* framework: the non-Indian's "transaction" was with an Indian and took place on the reservation.

It is important to note that an affirmance in these cases will *not* (as was the case in *Williams*) result in the ouster of any competing jurisdiction. Respondents are merely seeking to vindicate their exercise, under appropriate circumstances, of a jurisdiction which is asserted by them to be concurrent only.

d. *United States v. Mazurie*

Williams v. Lee, supra rests fundamentally on the inherent governmental authority of the tribe over reservation affairs. The subsequent case, *United States v. Mazurie*, 419 U.S. 544 (1975), also rests on that inherent tribal authority, but in a somewhat different sense: *Mazurie* holds that *because of its inherent sovereignty*, a tribe may be authorized by the federal government to regulate the on-reservation sale and distribution of liquor, a matter ordinarily subject to exclusive federal regulation. Specifically, this Court upheld the exercise of that delegated authority as against non-Indians operating a tavern on fee land with the reservation:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. [citation omitted] Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. [citation omitted] Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over *both their members and their territory*. *Worcester v. Georgia*, 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulat-

> ing their internal and social relations. . .," *United States v. Kagama*, 118 U.S. 375, 381-382 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973). [emphasis added]

419 U.S. at 556-57.

Secondly, *Mazurie* disposed of the contention that non-Indians, ineligible for membership or political participation in the tribe, cannot be properly subjected to the tribe's jurisdiction:

> The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim, that because respondents are non-Indians Congress could not subject them to the authority of the Tribal Council with respect to the sale of liquor, is answered by this Court's opinion in *Williams v. Lee*, 358 U.S. 217 (1959). In holding that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians, we stated:
>
> > "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-566." *Id.*, at 223 [citations omitted].

419 U.S. at 557-58 (footnote omitted).

e. *Tribal Subject Matter Jurisdiction*

Petitioners argue that this Court must in these cases choose between two divergent concepts of tribal jurisdiction: (1) "personal" jurisdiction, reaching only the activities of tribal members; or (2) "territorial" jurisdiction,

covering all the activities of all persons while on the reservation. Respondents submit, however, that this Court need not choose between these two rigid extremes. Instead this Court may in these cases declare a flexible jurisdictional standard which in fact is already manifest in its recent Indian decisions.

This proposed standard, referred to as tribal subject matter jurisdiction, will permit a case by case development of the substantive content of tribal jurisdiction over non-Indians, through analysis of the actual tribal interest in, and nexus with, the particular events asserted to be subject to such jurisdiction. It will emphasize the actual subject matter of these events and *not* merely the tribal affiliation of the parties (as in "personal" jurisdiction) or the situs of the events (as in "territorial" jurisdiction).

In support of this, we submit that, in the final analysis, the authorities discussed in this section 4, stand for the following general jurisdictional principle: a tribe possesses jurisdiction to regulate by all appropriate means—civil or criminal—the on-reservation activities of non-Indians, as to which there is a sufficient tribal interest.[69]

At the heart of this suggested principle is the existence of a "sufficient tribal interest." Analystically, this is intended to reflect the actual nature of the jurisdictional analysis performed in such cases as *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976), *Fisher v. District Court*, 424 U.S. 382 (1976) and *United States v. Mazurie, supra,*

69. It is noteworthy that the United States in its Brief as Amicus Curiae (at 1) suggests this standard in the formulation of its "Question Presented." *See also* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 Utah L. Rev. 206, 222-24 (1973).

which is exemplified by the following language in *Williams v. Lee, supra*:

> Over the years this Court has modified these principles [of tribal jurisdiction] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained.

358 U.S. at 219.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. [citations omitted]

358 U.S. at 223.

Admittedly, one cannot fashion directly from existing Indian case law a rigorous general definition of "sufficient tribal interest." However, its practical meaning may be seen in concrete situations in which this Court has confirmed tribal jurisdiction over the on-reservation activities of non-Indians, such as: the taxable activities of the ranchers in *Morris v. Hitchcock*, 194 U.S. 384 (1904); the business transactions of the operator of the general store in *Williams v. Lee, supra;* and the licensing of the tavernkeeper in *United States v. Mazurie, supra.*[70]

Furthermore, this concept is both familiar and well-developed in the law of jurisdiction generally.[71]

70. This analysis is consistent with the line of cases in this Court holding that *absent* any Indian or federal personal or property interest, states may exercise jurisdiction over non-Indian v. non-Indian crimes. *United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896); *Donnelly v. United States*, 228 U.S. 243, 272 (1913). *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946).

71. *See generally* the discussion of "specific jurisdiction" in Von-Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966).

"Long-Arm" Jurisdiction

Such a standard—sufficient tribal interest—is analogous to the standard adopted by this Court in determining the validity of state "long-arm" statutes. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) this Court upheld Washington State jurisdiction over a Delaware corporation stating:

> But to the extent that a corporation exercises the privilege of conducting activities with a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations, and so far as those obligations arise out of or are connected with the activities with the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319.

Similarly, this Court has upheld a statute providing that operation of a car on a state's highways was an implied consent to the jurisdiction of the courts of that state. In *Hess v. Pawloski*, 274 U.S. 352 (1926) the Court held that the statute would merely require a non-citizen of the state:

> to answer for his conduct in the State where arise causes of action alleged against him. . . .

274 U.S. at 356.[72]

Taxing of Foreign Corporations

This Court has affirmed the power of a state to tax foreign corporations on the ground that a "sufficient nexus" existed to support the tax, finding that the foreign cor-

72. At the time of the incidents herein involved, notices had been placed in prominent positions at the entrances to the Port Madison Indian Reservation to the effect that entry onto the Reservation lands would be deemed implied consent to the jurisdiction of the Suquamish Tribal Court. Appendix at 21.

porations were:

> sufficiently involved in local events to forge some definite link, some minimum connection sufficient to satisfy due process requirements.

Northwestern Cement Co. v. Minn., 358 U.S. 450, 452, 464-65 (1958).

State Regulation of Interstate Commerce

Finally, the interest of a local government in regulating activities within interstate commerce has been recognized by this Court:

> [Local laws] are to be upheld because upon a consideration of all of the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of the local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress.

Parker v. Brown, 317 U.S. 341, 362-63 (1943).

Under this "sufficient tribal interest" standard, the Suquamish Tribe properly asserted its jurisdiction in the present cases. Oliphant was charged with assaulting a tribal police officer and resisting arrest. Belgarde was charged with recklessly endangering the life of a tribal police officer and injuring tribal property. Such offenses—against tribal personnel and property—are obviously subject matters in which the Tribe had sufficient interest to support its jurisdiction. In fact, no other forum manifested any interest, as evidenced by the failure to respond to the tribal request for law enforcement assistance.

5. Congress Has Confirmed by Statute the Continuing Existence of Tribal Authority Over Non-Indians.

Petitioners argue that this Court in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973) has established "federal preemption"—rather than inherent sovereignty—as the proper mode of analysis in these cases. We do not agree. In fact, in *McClanahan* (at 179) this Court confirmed that the proper analysis in cases dealing "principally with situations involving non-Indians" is that employed in *Williams v. Lee*, 358 U.S. 217 (1959). And *Williams* can scarcely be characterized as anything but a "sovereignty" case.

Futhermore, the "preemption" mode of analysis has utility *only* in cases testing the assertion of *state* power. That is, claims of state jurisdiction may be defeated on the basis of federal preemption.

It may well be, however, that a variant of "preemption" is useful in cases measuring the reach of *tribal* power. Specifically, in such cases it is of unquestionable significance that there exists a federal statutory confirmation of the tribal power. In fact, such confirmation exists in these cases.

a. Indian Reorganization Act of 1934

The Suquamish Indian Tribe is a federally recognized Indian Tribe[73] organized under the Indian Reorganization

73. Petitioners question (Pet. Br. at 28) the official status of the Suquamish Indian Tribe. However, the official status of an Indian tribe is a political question. As this Court stated:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

U.S. v. Holiday, 3 Wall. 407, 419 (1805); *United States v. Sandoval*, 231 U.S. 28, 47 (1913); *Baker v. Carr*, 369 U.S. 186, 215 (1962).

Act of 1934 (48 Stat. 984, 987, 25 U.S.C. §476) and acting under a Constitution and By-Laws approved by the Secretary of the Interior.[74]

The purpose of the Indian Reorganization Act of 1934 [hereinafter IRA] was to encourage Indian tribes to revitalize their self-government.[75] The intent of the Act was to give Indians "a chance to develop the initiative destroyed by a century of oppression and paternalism."[76]

Significantly, one of the very purposes of that revitalization was to encourage "[tribal] courts to become stronger and more highly organized."[77]

As stated in *Fisher v. District Court*, 424 U.S. 382, 390 (1976), the IRA constitutes a federal statutory confirmation of the authority and power of a tribal court:

> The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by §16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476. Consequently, it implements an overriding federal policy. . . .

Futhermore, not only the policy implemented by the Act, but also the express terms of the IRA indicate a federal confirmation of existing tribal power. This was best expressed in the authoritative Opinion of the Solicitor of the Department of the Interior issued contemporaneous with the enactment of the IRA, *Powers of Indian Tribes*, 55 I.D. 14 (1934).[78] The purpose of that Opinion was to identify

74. Appendix at 49; Exhibit 2 (in separate envelope) to Memorandum of United States as Amicus Curiae (Supp. R. 101-115).

75. *Fisher v. District Court*, 424 U.S. 382, 387 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).

76. *Mescalero*, 411 U.S. at 152; H.R. Rep. No. 1804, 73rd Cong. 2nd Sess. 6 (1934).

77. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

78. Cited with approval in *Williams v. Lee*, *Id.* at 219 n.4.

those *existing* tribal powers confirmed by the Act. The Solicitor determined that Indian tribes retained a broad range of internal powers.[79] including judicial power over non-Indians:

> [S]o long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Similarly, *it might punish aliens within its jurisdiction according to its own laws and customs.* Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government. [emphasis added]

55 I.D. at 57.

b. *Indian Civil Rights Act of 1968*

Recent, and even more direct, federal statutory confirmation of tribal court jurisdiction over non-Indians is found in the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. §1302. This is shown by the terms of the Act, as explained by its legislative history.

The Act was the result of several years of congressional focus on the problems facing Indian tribes and, in particular, tribal courts. Prior to passage of the Act, tribal governments were not subject to restrictions similar to the limitations on the actions of federal and state governments contained in the Bill of Rights. *Talton v. Mayes*, 163 U.S. 376 (1896). This Act extended specifically enumerated protections, akin to certain of those in the Bill of Rights, to

79. The Solicitor identified "internal" powers as those powers that are "domestic" rather than "international." 55 I.D. at 22. *See*, in particular, the discussion regarding the administration of justice 55 I.D. at 56-64.

individuals coming in contact with tribal government. In addition, it limited tribal court penalties to imprisonment for a term of six months or a fine of $500.00.

The Act was originally introduced by Senator Sam Ervin in 1965 as S. 961. It provided that Indian tribes exercising powers of self-government would be subject to the *same* limitations and restraints as those imposed on the United States by the Bill of Rights. In June, 1965, at hearings on the Bill, the Department of Interior, through Frank J. Barry, Solicitor, introduced a substitute bill which would have extended certain enumerated rights to "American Indians in their relations with their tribal governments."[80] In May, 1966, the Department of the Interior submitted supplemental testimony to the Committee and a revision of the substitute bill which had been suggested in June, 1965. The new version, along with some other changes, substituted the term "any person" for the term "American Indian" throughout the Bill:

> The revised version simplifies the appeal provisions and establishes rights for *all* persons who may be subject to the jurisdiction of tribal governments, *whether Indians or non-Indians.* [emphasis added][81]

In its recommendations[82] the Subcommittee recommended the use of the Interior Department's substitute bill in lieu of the original S. 961. The language recommended in the Interior Department's second substitute remained in the bill through passage.

80. *Constitutional Rights of the American Indian*: Hearings on S. 961 Before the Subcomm. on Const. Rights of the Senate Judiciary Comm., 89th Cong., 1st Sess. 16, 318 (June 22, 1965).

81. *Summary Report on the Constitutional Rights of American Indians*, Subcomm. on Const. Rights of the Senate Judiciary Comm., 89th Cong., 2nd Sess. 10 (1966).

82. *Id.* at 25.

Consequently, the enactment of the 1968 Indian Civil Rights Act demonstrates that: (1) Congress confirmed that Indian tribes exercise jurisdiction over non-Indians when carrying out their powers of self-government, and (2) both Indians and non-Indians now have available "sources of protection against arbitrary tribal action. . . ." *United States v. Mazurie*, 419 U.S. at 558 n.12. In fact, both the Ninth Circuit[83] in *Oliphant*, and the District Court[84] in *Belgarde* noted that, should the Suquamish Tribe, in carrying out its jurisdiction over Petitioners, violate any of the provisions of the Indian Civil Rights Act, Petitioners would have the Act's protection of habeas corpus review in federal court.[85]

6. The Suquamish Tribe's Authority Over Petitioners' Offenses Is Consonant with Contemporary Federal Indian Policy, and Was Justified By Law Enforcement Conditions on the Port Madison Reservation.

An affirmance in these cases would further a strong federal policy which seeks to encourage Indian tribes to assume their responsibilities as the local governments of their reservations. And, it is entirely appropriate for this Court to resolve the issues presented with a sensitivity to that federal policy:

> Present federal policy appears to be returning to a focus upon strengthening tribal self-government, see e.g., Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. §§145 et seq.; Indian Self-Determination and Educational Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §§450 et seq., and the Court of Appeals for the Ninth Circuit has expressed the view that courts "are not obligated in ambiguous circumstances to strain

83. Appendix at 60.

84. Appendix at 117-119, 122.

85. 25 U.S.C. §1303.

> to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." *Santa Rosa Band of Indians v. Kings County, supra.* . . .

Bryan v. Itasca County, 426 U.S. 373, 388 n.14 (1976).

Since 1968, the United States has consistently encouraged Indian tribes to enhance and exercise their powers of self-government. Thus, the 1968 Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.*, confirmed these tribal governmental powers and at the same time established safeguards, available to Indians and non-Indians alike, against arbitrary exercise of that governmental authority.

In 1970, the President in a message to Congress[86] indicated a policy of self-determination for Indians through the strengthening of tribal government.

Furthermore, the following congressional enactments accord to tribal government the standing of "local government": Federal Property and Administrative Services Act, as amended 40 U.S.C. §483(a) (2); Federal Water Pollution Prevention and Control Act, 33 U.S.C. §§1251 *et seq.*, 1362(4); State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1227(b)(4); Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §3781(d).

Particularly significant is the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450a-450n. This Act, which has as its primary purpose the establishment of a "meaningful Indian self-determination policy" 25 U.S.C. §450a(b), contains the following congressional finding with respect to tribal authority vis a vis

86. The President's Message to the Congress of the United States, Recommendations for Indian Policy, July 8, 1970, 116 CONG. REC. 23258 (1970).

non-Indians:

> The Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

25 U.S.C. §450(a) (2).

One manifestation of this strong federal policy is of paramount importance in these cases: the financial and technical assistance given through these Acts to Indian tribal justice and law enforcement systems. As a result, tribal courts have become revitalized, tribal judges and police more intensively trained, and tribal governments more responsive to the complex needs of all reservation residents. This progress has been achieved with the support and encouragement of the federal agencies.[87]

Finally, the Suquamish Tribal Court and police have each participated in these enhancement programs. The Tribal judges and police take part in extensive educational programs and in-service training.[88] Thus, an affirmance in these cases would assist in the realization of a dynamic federal Indian policy calculated to encourage the Suquamish Tribe to assume the very responsibilities of reservation government which are involved in these cases.

Furthermore, the law enforcement conditions giving rise to these very cases confirm the soundness of this federal policy.

These cases demonstrate that but for Suquamish tribal

87. For a more extensive examination of the growth and resurgence of tribal law enforcement and justice systems, *see, Final Report of the American Indian Policy Review Commission*, Vol. 1 at 160-68 (1977); Brief of Amicus Curiae National American Indian Court Judges' Association; Brief of Amicus Curiae National Tribal Chairmen's Association.

88. This Court has in the past considered such matters as relevant to a determination of tribal court power. *Williams v. Lee*, 358 U.S. 217, 222 (1959).

jurisdiction over Petitioners' alleged offenses, persons and property on the Reservation would have gone unprotected.

After many years of ineffective federal and state law enforcement on the isolated Port Madison Indian Reservation, the Tribe found it necessary to pass a tribal code to regulate the conduct of persons within its jurisdiction. The tribal code defines as offenses acts which would ordinarily be deemed petty offenses or misdemeanors in other jurisdictions. Furthermore, in accordance with 25 U.S.C. §1302 (7), penalties are limited to the maximum of six months imprisonment and/or a $500.00 fine.

When the Tribe planned its annual Chief Seattle Days Celebration, it expected thousands of people to congregate in a small area on the Tribal Encampment Grounds for the Celebration. Requests were made of state, county, and federal law enforcement officials for law enforcement assistance. The Tribe was told that it would have to provide its own law enforcement out of tribal funds with tribal personnel. Therefore, when Petitioner Oliphant allegedly committed his offense at 4:30 a.m., the only law enforcement officers available to deal with the situation were tribal deputies. Without the exercise of jurisdiction by the Tribe, there would have been no law enforcement whatsoever on the Reservation during this major gathering, clearly creating a danger to public safety.

Petitioner Belgarde's alleged offense also occurred during the night. There was a similar lack of law enforcement assistance from other jurisdictions. If tribal members cannot be protected from such offenders, there will be a powerful motivation for such tribal members to leave the reservation, thereby counteracting the express congressional

policy of improving the quality of reservation life.

Federal law is not designed to cover the range of conduct normally regulated by local governments. Minor offenses committed by non-Indians within Indian reservations frequently go unpunished and thus unregulated.[89] Federal prosecutors are reluctant to institute federal proceedings against non-Indians for minor offenses in courts in which the dockets are already overcrowded, where litigation will involve burdensome travel to witnesses and investigative personnel, and where the case will most probably result in a small fine or perhaps a suspended sentence.

Prosecutors in counties adjoining Indian reservations are reluctant to prosecute non-Indians for minor offenses where limitations on state process within Indian country may make witnesses difficult to obtain, where the jurisdictional division between federal, state and tribal governments over the offense is not clear, and where the peace and dignity of the government affected is not their own but that of the Indian tribe.

Without tribal law enforcement, traffic offenses, trespasses, violations of tribal hunting and fishing regulations, disorderly conduct and even petty larcenies and simple assaults committed by non-Indians go unpunished. The dignity of the tribal government suffers in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior necessarily follows. With the increased travel and involvement of non-Indians on Indian reservations, any impediment to full tribal jurisdiction within its own territory is intolerable.

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89. *See* Vollmann, *Criminal Jurisdiction In Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Kan. L. Rev. 387 (1947); Brophy and Aberle, *The Indian: America's Unfinished Business* 50 (1966).

7. The State of Washington Does Not Have Exclusive Jurisdiction Over Petitioners' Offenses.

Petitioners claim that if the Tribe once had jurisdiction over offenses such as theirs, concurrent with general federal criminal jurisdiction, nevertheless, such tribal jurisdiction was terminated by Washington's assumption of exclusive jurisdiction pursuant to Public Law 83-280, 66 Stat. 588 (1953) [hereinafter P.L. 280].[90]

On the other hand, we contend as follows:

a. The State has not validly assumed *any* P.L. 280 jurisdiction due to its failure to properly amend its Constitution. If this Court agrees, that ends the matter.

b. Furthermore, any P.L. 280 jurisdiction that the State may have initially assumed on the Port Madison Reservation was reduced from total to partial jurisdiction through retrocession.

c. But, such partial jurisdiction could not have been valid since either:

(1) P.L. 280 itself does not permit a partial jurisdiction; or

(2) Partial jurisdiction is a denial of equal protection

90. In 1957, (Wash. Laws of 1957, ch. 240, App. Pet. Brief at 19a) the state of Washington provided for total assumption of civil and criminal jurisdiction over Indian reservations, with the consent of the tribal government involved. In 1963, (Wash. Laws of 1963, ch. 36, RCW 37.12.010, App. Pet. Brief at 20a) the state enacted an additional statute providing for assumption of jurisdiction, irrespective of tribal consent, but with the following exemption: "Indians when on their tribal lands or allotted lands" on reservations, provided this exemption would not apply in eight specifically enumerated subject matters.

In 1958, the Suquamish Tribe consented to the "total" assumption of jurisdiction under the 1957 statute. In 1972, the Governor, at the request of the Tribe, retroceded to the United States all but the "partial" jurisdiction assumed under the 1963 statute.

of the laws.[91]

d. Even if valid, that partial jurisdiction, by definition, would cover Belgarde, but not Oliphant.

e. Finally, the above four questions need not be answered since any P.L. 280 jurisdiction to which Petitioners are subject would be, at most, concurrent with tribal jurisdiction.[92]

a. *All State P.L. 280 Jurisdiction Is Invalid*[93]

Prior to enactment of P.L. 280, Washington was organically precluded from assuming any Indian jurisdiction by virtue of the Enabling Act, 25 Stat. 676, §4 and the disclaimer in the Compact in art. 26, Section Second of the State Constitution. Each of these prohibited State Indian jurisdiction until (1) Indian title was extinguished and (2) Congress consented to state Indian jurisdiction.

Since in 1953 much Indian land remained in trust, Congress added §6 of P.L. 280 to authorize the eight states, including Washington, with such constitutional impediments to assumption of Indian jurisdiction, to assume Indian jurisdiction without extinguishment of Indian title, *provided* each state first amend its constitution to eliminate the disclaimer of Indian jurisdiction.

91. The State partial assumption statute, RCW 37.12.010, was held invalid on this ground in *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 552 F.2d 1332 (9th Cir. 1977). The case is on appeal to this Court, but the Court has taken no action with regard to that appeal at this time.

92. Respondents adopt *in toto* in support of sections a and c, *infra* the detailed arguments demonstrating the invalidity of Washington's assumption of P.L. 280 jurisdiction contained in the Brief of Amici Curiae Confederated Tribes of the Colville Indian Reservation, Washington, and Makah Indian Tribe of the Makah Indian Reservation, Washington, filed herein. Brevity demands that the detailed analysis be omitted here but rather adumbrated in summary fashion.

93. This is only a summary of this argument. *See* note 92, *supra*.

The sponsors of P.L. 280, testimony in congressional hearings and on the Senate floor, and the Senate and House reports which accompanied the Act (H.R. 1063), unanimously agreed that §6 governed Washington and required amendment of the State Constitution. And it is beyond cavil that P.L. 280 means what Congress intended it to mean. *Jones v. Guaranty & Indemnity Company,* 101 U.S. 622 (1879).

However, the Washington legislature attempted to assume Indian jurisdiction first through ch. 240, Laws of 1957 and later through ch. 36, Laws of 1963, *without* the prescribed constitutional amendment. Since §6 specifically provided that:

> The provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be . . .

Washington could not, as a matter of federal law, assume any Indian jurisdiction under P.L. 280.

Both the Washington Supreme Court and the Ninth Circuit Court have attempted to avoid this conclusion. In *Makah Indian Tribe v. Washington,* 76 Wn.2d 485, 457 P.2d 590 (1969), the Washington court held that the requirement in §4 of the Enabling Act and art. 26 of the State Constitution making the disclaimer irrevocable without the consent of the people of the State was equivalent to a requirement of consent of the people of the state "speaking through the legislature." And in *Quinault Tribe of Indians v. Gallagher,* 368 F.2d 648 (9th Cir. 1966), the Ninth Circuit Court held that §6 of P.L. 280 required only that the constitutional disclaimer be removed in some way

which would be valid and binding under State law.

The reasoning of those two holdings is patently specious. An analysis of §4 of the Enabling Act makes very clear that the Compact is between the federal government and the people of the State and requires the consent of the people as opposed to the consent of the legislature. Further, in the Hearing on H.R. 1063 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representative, 83rd Congress, 1st Sess. (June 24, 1953), Rep. Wayne Aspinall, referring to elimination of the disclaimer in the compacts, laid the matter to rest once and for all by stating:

> The State Legislature would not do it. The people of the state themselves would have to do it.

Subcommittee Hearing on H.R. 1063 at 24.

Moreover, this Court has made it clear that a state may not assume Indian jurisdiction except upon strict compliance with the applicable provisions of P.L. 280 in *Kennerly v. District Court of the Ninth Judicial District of Montana,* 400 U.S. 423, 427 (1971):

> *[N]or was the requirement of affirmative legislative action an idle choice of words. . .*
>
> [O]ur conclusion as to the intended governing force of §7 of the 1953 Act is reinforced by the *comprehensive and detailed congressional scrutiny* manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain States to Indian country. [emphasis added]

Furthermore, in the more recent case *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 177-78 (1973) this Court stated:

> [T]he Act expressly provides that the State must act "with the consent of the tribe occupying the particular

> Indian country," 25 U.S.C. §1322(a), . . . *and* must "appropriately [amend its] constitution or statutes." 25 U.S.C. §1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. *But we cannot believe that Congress would have required* the consent of the Indians affected and *the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. See Kennerly v. District Court,* 400 U.S. 423 (1971). [footnotes omitted] [emphasis added]

Importantly, §1324, which this Court referred to as a "statutory imperative," is a re-enactment of §6 of P.L. 280.

b. *Retrocession of Jurisdiction*

In 1958, the Suquamish Tribe requested the State to assume total jurisdiction over the Reservation.[94] However, with the growth of the Indian self-determination movement in the 1960's and the failure of the State to provide adequate law enforcement, the Tribe realized its mistake and requested the Governor to retrocede criminal and civil jurisdiction to the United States. On August 26, 1971, Governor Daniel J. Evans proclaimed that retrocession,[95] which was accepted on April 14, 1972, by the United States. This acceptance was published, in accordance with the terms of 25 U.S.C. §1323, the retrocession statute. 37 F.R. 7353 (1972).[96]

Subsequently, the Attorney General of the state of Washington opined that: (1) the Governor could perform only *limited* ministerial functions with regard to the proclamation or retrocession of jurisdiction, (2) the Governor lacked

94. App. Pet. Brief at 58a-59a.
95. App. Pet. Brief at 63a.
96. App. Pet. Brief at 64a.

authority to retrocede jurisdiction, and (3) that such action would have to be taken by the Legislature.

But, in *State v. Bertrand,* 61 Wn.2d 333, 378 P.2d 427 (1963), the Washington State Supreme Court held that the governor's function in proclaiming jurisdiction over an Indian reservation was not purely "ministerial" and involved the exercise of his executive discretion. Therefore, having such executive discretion, the governor cannot be said to have exhausted his power when he performs the initial discretionary act of proclaiming jurisdiction. The power to grant recognition must carry with it the power to subsequently withdraw it on reconsideration. Where an Indian tribal government has changed its views and desires, and makes these changes known to the governor, who agrees, the governor must be able to reconsider his original proclamation and retrocede jurisdiction, if he feels this would be in the best interests of the tribe and the State.

In any event, this Court need not determine these state law issues, since once the United States officially accepted the retrocession, it was valid and binding.

In *Omaha Tribe of Nebraska v. Walthill,* 334 F. Supp. 823 (D. Neb. 1971), *aff'd.,* 460 F.2d 1327 (8th Cir. 1972), *cert. denied,* 409 U.S. 1107 (1973), the Court held that a retrocession of jurisdiction made under procedures admittedly invalid under state law was nevertheless valid and binding upon acceptance by the Secretary of the Interior. The Court concluded that the state of Nebraska failed to follow its own legal procedures, but that the important question was whether the state resolution was valid under federal law, not state law. In so holding, the Court noted that the Secretary of the Interior was not authorized to

investigate the procedural or technical validity of every notice he received:

> [O]nce the Secretary received from the state officials what appeared to be an official act of the state offering a retrocession, he was entitled to rely thereon for purposes of the acceptance authorized by the federal statute.

334 F. Supp. at 832.

Such an analysis was employed in *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971). The Court concluded:

> The plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action, are all factors to be considered and lead the Court to the conclusion that the federal interpretation of the effectiveness of state action triggering the reassertion of federal jurisdiction is and was controlling.

334 F. Supp. at 541.

The Court in *United States v. Brown* cited *Leser v. Garnett*, 258 U.S. 130 (1922), in which this Court determined the significance of the invalidity under state law of two state legislature ratifications of the Nineteenth Amendment. In *Leser* this Court held that once the Secretary of State was officially notified of the state ratifications, it was conclusive upon him, and, being certified to by his proclamation, was conclusive upon the courts.

In our case, the Governor's proclamation of retrocession was accepted in behalf of the United States by the Secretary of the Interior. The Secretary was authorized to accept such a retrocession of state jurisdiction by Executive Order

No. 11435,[97] in accordance with 25 U.S.C. §1323. That statute provided that acceptance of retrocession would be effected by publication of notice thereof in the Federal Register. In accordance therewith, Notice of Acceptance of Retrocession of Jurisdiction for the Port Madison Reservation was published in the Federal Register on April 13, 1972. 37 F.R. 7353.[98] With this acceptance, the requirements of federal law were met, and the retrocession was accomplished, notwithstanding any possible invalidity under state law of the governor's action.

Finally, the effect of this retrocession (by its own terms) was to reduce the Port Madison Reservation from total to partial P.L. 280 jurisdiction.

c. *Partial State P.L. 280 Jurisdiction Is Invalid*[99]

(1) Partial State P.L. 280 Jurisdiction Violates P.L. 280

Washington's attempted assumption of P.L. 280 jurisdiction purports to establish a scheme of *partial* jurisdiction. However, P.L. 280 granted California, Minnesota, Nebraska, Oregon and Wisconsin *total* civil and criminal Indian jurisdiction, providing that "the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State" and "those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." The *only* partial aspect of P.L. 280 was that three Indian tribes were exempted. Otherwise P.L. 280 decidedly did not authorize a partial

97. November 21, 1968, 33 F.R. 17339.
98. App. Pet. Brief at 64a.
99. This is only a summary of this argument. *See* note 92, *supra*.

assumption of Indian jurisdiction.

In contrast, the Indian Civil Rights Act of 1968, P.L. 90-284 (25 U.S.C. §§1301-1302 and §§1321-1326) provides specifically that with the consent of the affected Indian tribes a state may assume jurisdiction over *all or any* criminal offenses and *all or any* civil causes of action within *all or any* area of Indian country. Again Rep. Aspinall explained these provisions would substantially amend P.L. 280 by permitting states to assume *partial* Indian jurisdiction.

(2) Partial State P.L. 280 Jurisdiction is Invalid as a Denial of Equal Protection of the Laws.

Washington's particular pattern of Indian jurisdiction is based upon an arbitrary and indefensible territorial assumption, namely, that state Indian jurisdiction is important on non-trust land but not important on trust land. For example, the State's jurisdiction on the Port Madison Indian Reservation is total on non-trust land but limited on trust land to eight subject matters: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles upon the public streets, alleys, roads and highways.

This jurisdictional tangle makes acts occurring on non-trust land subject to state jurisdiction but leaves those occurring on trust land subject to tribal or federal jurisdiction. But subjecting criminal defendants or parties to civil litigation to different courts, rules of procedure and substantive law on the random basis of land title cannot possibly serve a justifiable state governmental objective. Respondents concur with the conclusion of the Ninth Circuit

Court of Appeals which struck down the Washington statute in *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 522 F.2d 1332, 1336 (9th Cir., 1977):

> This checkerboard jurisdictional structure based on a selection by land title is the "very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ." Accordingly, the partial territorial assumption of criminal jurisdiction under R.C.W. §37.12.010 is a denial of equal protection.

d. *No State Jurisdiction Over Oliphant*

Petitioners contend that under the Washington partial assumption law, RCW 37.12.010, the State has jurisdiction over the offenses allegedly committed by both Petitioners. If this statute were valid, concededly the State would have jurisdiction over the offenses allegedly committed by Belgarde, as they occurred on non-trust lands. However, since Oliphant's alleged offenses were committed on tribal land, they fall within the below quoted exemption in the state statute.

That exemption is set forth in RCW 37.12.010:

> [S]uch assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands. . . .

Petitioners argue that this exception covers only offenses committed *by* Indians, and not offenses committed *against* them.

However, RCW 37.12.030 states:

> Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in RCW 37.12.010 committed *by or against Indians* in the lands prescribed in RCW 37.12.010. . . . [emphasis added]

The statute is therefore clear: the assumption of jurisdiction effected by RCW 37.12.010 covers offenses committed by Indians and offenses perpetrated against Indians. That is, "Indians" as used in RCW 37 12.010 includes Indian offenders and Indian victims. Therefore, the term "Indians" in the above quoted exemption language of RCW 37.12.010 must also include Indian offenders and Indian victims. Accordingly, Oliphant's alleged offense—involving an Indian victim and occurring on tribal land—falls within the exemption.

This interpretation is supported by well-established doctrines of statutory construction. Statutory provisions which are part of the same act—such as §.010 and §.030—are *in pari materia* and should be construed in their entirety. 73 Am. Jur. 2d *Statutes* §§187-191.

In addition, P.L. 280 itself provided for state assumption of jurisdiction "over offenses committed by or against Indians in the areas of Indian country . . ." and RCW ch. 37.12 was enacted under P.L. 280. Therefore, the two statutes should be interpreted in harmony. 73 Am. Jur. 2d *Statutes* §193. Accordingly, it must be assumed that all areas of jurisdiction taken by the state match those described in P.L. 280. Finally, this interpretation would accord with the established policy of construing statutes in favor of federal jurisdiction. *See Rice v. Olson*, 324 U.S. 786, 789 (1945).

e. *Any State Jurisdiction Is Concurrent With Tribal Jurisdiction*

In any event, if this Court were to hold that the State has P.L. 280 jurisdiction over Petitioners' offenses, tribal jurisdiction over these offenses would still not be defeated.

Respondents contend that any jurisdiction assumed by the State is, at most, concurrent with tribal jurisdiction.

The Terms and Legislative History of P.L. 280

There is nothing in the terms or legislative history of P.L. 280 indicating a congressional intent to extinguish tribal jurisdiction. In fact, it is evident, from the committee reports,[100] that the purpose of the legislation was merely to substitute state jurisdiction for the existing federal jurisdiction.

As the committee reports show, tribal courts were not functioning effectively at the time of the passage of P.L. 280. Thus the burden of law enforcement in Indian country was in fact falling on the concurrent[101] federal jurisdiction. As a result, federal courts and prosecutors were highly desirous of ridding themselves of the complex problems of law enforcement on Indian reservations. It was this pressure to which Congress was responding; the concurrent tribal jurisdiction was ignored.

Therefore, it was only the concurrent federal jurisdiction that P.L. 280 was purporting to transfer to the State. And, of course, Congress, without appropriate *express* language, could not have transferred any more than its own share of the concurrent jurisdiction. P.L. 280 is a statute passed for the benefit of Indian tribes which is to "to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Furthermore, as *Bryan* states (at 393), whether a tribal power had been terminated under P.L. 280—"an

100. H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953); S. Rep. No. 699, 83rd Cong., 1st Sess. (1953).

101. As demonstrated at §2, *supra* federal and tribal criminal jurisdiction are concurrent.

ambiguous statute"—is to be determined under the standards applied to "termination" acts:

> "Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the . . . Act. This being so, we are not inclined to infer an intention to terminate. . . . A congressional determination to terminate must be expressed on the fact of the Act or be *clear* from the surrounding circumstances and legislative history." [citation omitted] [emphasis added.]

Yet, the statute does not contain any language purporting to extinguish tribal jurisdiction; nor does the legislative history.

Finally, this result is supported by the provision of the Indian Civil Rights Act of 1968[102] authorizing retrocession of a state's P.L. 280 jurisdiction. If P.L. 280 extinguished tribal powers, then such a retrocession would restore such powers. Yet, while the 1968 Act inserted the requirement of tribal consent for future state assumptions of P.L. 280 jurisdiction,[103] it did not include a tribal consent requirement in the case of future retrocessions of P.L. 280 jurisdiction. But, if it were true that retrocession would restore tribal jurisdiction, one would think that the 1968 Congress —which was exhibiting exceptional deference to the views of affected tribes[104]—would naturally have required a tribal consent to retrocession. It is accordingly logical to conclude that Congress did not view retrocession as restoring to tribes a previously taken jurisdiction.

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102. 25 U.S.C. §1323.

103. 25 U.S.C. §§1321, 1322.

104. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 550 (1975) [hereinafter cited as Goldberg (1975)].

The 1970 Amendment of P.L. 280

Petitioners assert that a 1970 amendment of P.L. 280 (84 Stat. 1358, 18 U.S.C. §1162(a), (c)) supports the proposition that tribal jurisdiction is not concurrent with state P.L. 280 jurisdiction. However, the legislative history does not support Petitioners' claim.

The 1970 amendment was introduced at the request of the Metlakatla Indian Community and the State of Alaska.[105] It was sought for the limited purpose of clarifying—as to the isolated Metlakatla Reservation *only*—the question of whether Alaska's P.L. 280 jurisdiction was concurrent with tribal jurisdiction. Thus, the 1970 amendment was enacted for the purpose of making clear that concurrent tribal and state jurisdiction existed on that reservation. Decidedly, it was not introduced to *create* or otherwise *establish* the tribal jurisdiction, but rather to *confirm* it. Therefore, it cannot properly be inferred that tribal jurisdiction does not exist on all *other* P.L. 280 reservations. In fact, that question was not before Congress, and the legislative history reveals no analysis of this general question.

The 1970 amendment also added the following language to the existing statute:

> The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as *areas over which the several States have exclusive jurisdiction.* [emphasis added]

At first blush, one might conclude that the emphasized language confirms the *absolute* exclusivity of state juris-

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105. 1970 U.S. Code Cong. and Adm. News 4783.

diction. However, the legislative history reveals that this language was intended merely to confirm that state jurisdiction exists exclusive of *federal* jurisdiction *only*. In a letter to the House Judiciary Committee, the principal sponsors indicated the intent of this language:

> The additional language is descriptive only, and is not meant to change the meaning of 1162(c). It was added because subsection (c) refers to the "Indian country listed in subsection (a)" and that list includes Indian country not under state jurisdiction, as well as areas that are. Obviously sections 1152 and 1153 are meant to apply to the former category. The additional language is not intended to have any bearing on actual or potential arrangements between states and the tribes with respect to the allocation of law enforcement responsibility between them.
>
> While the additional language is perhaps unnecessary, it was added for purposes of clarity.[106]

In commenting on this amendment, Rep. Donahue further noted that the change would not affect "whatever inherent jurisdiction particular tribes may have retained."[107] These comments indicate that the amendment was not meant to affect any inherent jurisdiction that the tribes possessed, but rather to clarify the relationship between the state and the federal government in states which had assumed P.L. 280 jurisdiction.

Originally, the Department of the Interior had recommended that the amendment be deleted from the Bill. Significantly, however, following the above quoted letter of the sponsors, the Department withdrew its objection. In

106. Letter to the House Judiciary Committee, October 14, 1970, 116 Cong. Rec. 37354-55 (1970).

107. 116 Cong. Rec. 37354 (1970).

a letter from the Assistant Secretary of the Interior[108] the Department stated that, given the understanding of the amendment expressed in the earlier letter from the sponsors:

> which we interpret to mean that the amendatory language will have no effect on whatever inherent jurisdiction particular Indian Tribes may have retained in states which have assumed jurisdiction pursuant to [Public Law 280] . . . we would not object to the enactment of the measure.

An Exclusive State P.L. 280 Jurisdiction Would Undermine Tribal Government

While *Bryan v. Itasca County* dealt with the imposition of state taxation, a *civil* matter, we submit that this Court's analysis in that case is equally applicable in an assessment of P.L. 280's consequences vis a vis tribal *criminal* jurisdiction:

> [N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than " 'private, voluntary organizations,' " United States v. Mazurie 419 U.S. 544, 557 (1975). . . .

Bryan, 426 U.S. at 388.

Assuredly, an interpretation that P.L. 280 extinguished tribal criminal jurisdiction *would* "result in the undermining or destruction" of tribal governments. Consider that a state's P.L. 280 jurisdiction ordinarily covers all persons—Indian and non-Indian—within Indian country. There-

108. Letter from Harrison Loesch, dated November 10, 1970, reprinted in 116 Cong. Rec. 37355 (1970).

fore, if P.L. 280 jurisdiction were to oust tribal jurisdiction, a tribe would lack jurisdiction even over *its own members.* Certainly, such a construction of P.L. 280 "might relegate tribal governments to a level below that of countries and municipalities, thus essentially destroying them," a result which *Bryan* (at 388n.14) would firmly reject.

Furthermore, it has been held that the substantive state law applicable to Indian reservations under P.L. 280 does not include laws and ordinances of counties and municipalities. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975) *cert. denied,* ..... U.S. ....., 97 S. Ct. 51 (1977). Therefore, without tribal law, the entire range of on-reservation conduct of the type ordinarily governed by county and municipal law would go unregulated.[109]

Moreover, *Bryan* (at 388 n.14) endorses the view that where ambiguous, P.L. 280 may be interpreted in harmony with prevailing federal Indian policy. Since, as discussed in section 6, *supra,* there exists presently a strong federal policy favoring the strengthening of tribal government, P.L. 280 should be interpreted as not impairing the inherent criminal jurisdiction of tribal government.[110]

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109. *See* Goldberg (1975), *supra* note 104 at 580-83.

110. This is the view of a noted commentator on P.L. 280 jurisdiction as well:

> [I]t is fair to say that given current federal policy encouraging stronger tribal governments and increased federal efforts to mitigate the offensive aspects of tribal autonomy within state boundaries, [footnote omitted] P.L. 280 should be interpreted to limit state jurisdiction where that is consistent with the often ambiguous language and legislative history.

Goldberg (1975), *supra* note 104 at 594.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgments of the courts below should be affirmed.

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Counsel for Respondents

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ERNSTOFF & CHESTNUT
By STEVEN H. CHESTNUT
Of Counsel

October 29, 1977

APPENDIX A

GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

To all to whom these presents shall come, Greeting:

By virtue of the authority vested in me by the Administrator of General Services, I certify on his behalf, under the seal of the United States General Services Administration, that the attached reproduction(s) is a true and correct copy of documents in his custody.

SIGNATURE: Phillip E. Lothian
NAME: PHILLIP E. LOTHIAN
DATE: 10/19/77
TITLE: Chief, Archives Branch
NAME AND ADDRESS OF DEPOSITORY:
Federal Archives & Records Center, GSA
6125 Sand Point Way, NE
Seattle, WA 98115

GSA DC 80-12478

GSA FORM 67918

Department of the Interior
Office Indian Affairs
August 30th 1854.

Sir:

By acquisition of this Office of the 12th instant, the sum of $18,000 was placed in your hands, & remitted to you from the appropriation of $45,000 made by the act of Congress approved July 31st 1854, "for expenses of negotiating treaties with and making presents of goods and provisions to Indian Tribes in the Territory of Washington."

It is the expectation of the Department that the sum appropriated, will prove sufficient to defray all expenses incurred in and incident to making conventional arrangements designed to be permanent, with all the Tribes and fragments of Tribes within your superintendency, by which the United States will extinguish their claim of title to all the lands within the Territory, excepting such limited districts as it may be deemed proper to assign them for their reservation in future; and I have now to inform you that you have been designated by the President as the Officer of the Indian Department to conduct the negotiations and conclude the treaties of amity and acquisition that are thus provided for.

The remittance of $18,000 above referred to, was made to enable you

to enter upon the discharge of the duty hereby assigned you, as soon as you should receive my instructions, and the funds will be applicable for the purchase of presents of goods and provisions, and for defraying all expenses of a preliminary and incidental character connected with the negotiations &c.

In accordance with the request made in your letter of the instant, I have directed the articles of Dry Goods and Hardware enumerated in the schedules thereunto annexed by you, to be procured from the Contractors with this Office for Indian Goods, and it is expected that the two Cutters, one of 100 tons burthen, and one of 150 tons will be shipped from New York to San Francisco by first sailing Clipper Ship, in a few days, & be forwarded to you, as you have requested, 1st to Columbia Barracks, Care of the U. S. Quartermaster, and 2nd to Olympia. Schedules of the goods thus forwarded, will be transmitted to you at Olympia, and as they will be shipped to the care of the Collector at San Francisco, you will correspond with him as to the time & mode of forwarding them thence to their respective destinations.

In concluding articles of agreement and convention with the

BEST COPY AVAILABLE

Indian Tribes in Washington Territory, Who will endeavor to reunite the Various Bands and Fragments of Tribes into Tribes, and provide for the Consolidation of one or more of such Tribes upon the Reservation which may be set apart for their future homes.

The formation of distinct relations with each of the forty or fifty separate Bands of Indians in Washington Territory, would be as likely to promote the best interests of the White Settlers or of the Indians, as if the latter could be concentrated on a limited number of Reservations, or on contiguous reservations in a limited number of Districts of Country apart from the Settlements of the Whites.

Unless some such Arrangement can profitably be effected, you will at present conclude Treaties with such Tribes or Bands only, as are located immediately adjacent to the Settlements of the Whites, and between whom and our own Citizens Commotion Serious, or disturbance of the Peace are reasonably apprehended and endeavoring upon the execution of the duty with which you are hereby charged, you will give your attention first to such Tribes and Bands.

It is desirable also that the Stipulations to be fulfilled annually on the part of the United States, be few

in number, and that the Indians obtain the Authority to dispose their proceeds to a variety of objects, such as the circumstances of the Indians at the time of payment may require.

This Suggestion you will extend, particularly if you are unable to effect the Consolidation of all the Bands into six or eight Tribes, or to arrange half a dozen Treaties or less so that every one of the Tribes shall be a party to one of them.

It is not deemed necessary to give you specific instructions as to the details of the Treaties. I however enclose to you herewith the Reports of the Treaties recently concluded by Supt Palmer at Table Rock & Umpqua Creek, Oregon Territory, with the Rogue River & Umpqua Indians and Tribes, & the Treaties lately concluded at this City with the Omahas & Otoes & Missourias Indians.

The Treaties negotiated by Supt Palmer are considered as exhibiting Provisions favorable on the part of the Government & advantages to the Indians, and will afford you valuable Suggestions. These with the Omahas & Otoes & Missourias, will indicate the policy of the Government in regard to the Ultimate Civilization of the Indian Tribes, the Graduation of Annuity Payments allowed to them, the encouragement of

of Schools and Religious among them,
the relinquishment of Indian Titles to
their settlements, the security to be given
against the application of their an-
nuity Funds for payment of debts
and claims; the terms on which roads
& railroads may be constructed through
their reservations, and the authority pro-
per to reserve to the President, of de-
-termining the manner in which
annuities of Indians shall be applied
for their benefit.

I would here remark, that
the amounts awarded to Tribes in
Nebraska will not be a criterion for
them, in regard to the amount of
the annual or other payments to be
made to Tribes in Washington, under
stipulations of the proposed Treaties, in
as much as the former held grants of
Land left off Reservations & Annuities, said
the lands had become valuable by re-
-ason of their proximity to the State of
Iowa, whilst the latter have claims of
title based upon occupancy alone, and
that occupancy of a certain vast Tract,
not well defined as to boundaries, and
the lands which they claim are re-
-moved from the portions of the Coun-
-try which have been long settled, &
highly improved and cultivated.

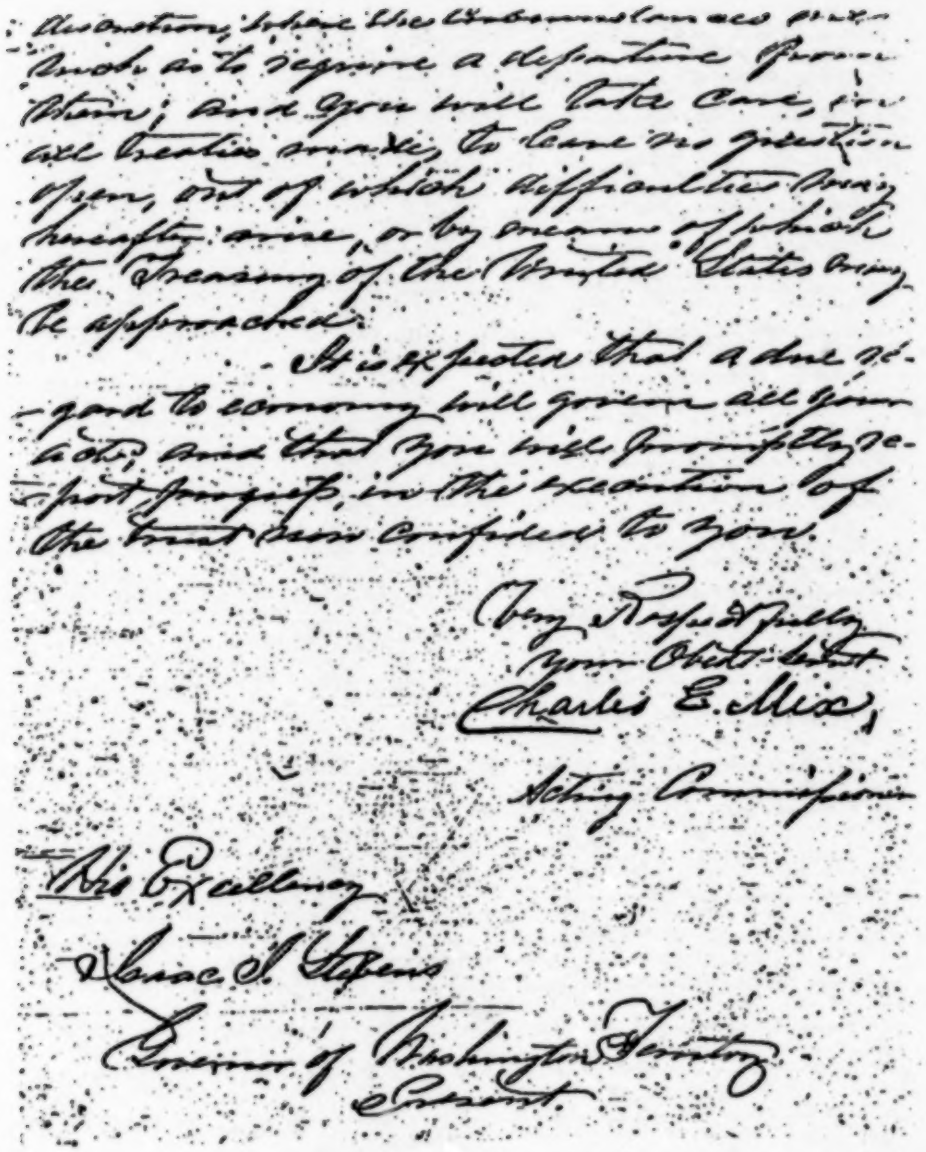
I would also refer you to the
late annual report of this Office,
and the last annual report of the

Secretary of the Interior, from which
you will perceive, that it is organized
by the Department to the best policy to
pursue, as far as it can be judicious by
done, the payment of Indian annu-
-ities in money, and to substitute
implements of Agriculture, Stock, Seeds,
and Articles necessary to the comfort
and civilization of the Tribes.

You will bear in mind the
distance that separates you from the
Capital, and the time which must
elapse from the negotiation of treaties
until you hear of the action of the Pre-
-sident and Senate upon them; and
you will hence caution the Indians
against expecting the first payments
of annuities to be made after the con-
-clusion of negotiations.

You will at your early con-
-venience, furnish to this Office a Skele-
-ton Map of Washington Territory, show-
-ing the location of the different Tribes
and Bands, and the boundaries of
the regions respectively claimed by each;
and as treaties are concluded from time
to time, in your reports accompany-
-ing them, furnish a description of
the reservation provided for the occu-
-pation of the Indians, with such pre-
-cision, that it may be marked upon
the Map here.

With these general views, you
are nevertheless thereby vested



question, where the circumstances are such as to require a departure from them; and you will take care, in all treaties made, to leave no question open, out of which difficulties may hereafter arise, or by means of which the Treasury of the United States may be approached.

It is expected that a due regard to economy will govern all your acts, and that you will promptly report progress in the execution of the trust now confided to you.

Very Respectfully
Your Obdt Servt
Charles E. Mix
Acting Commissioner

His Excellency
Isaac I. Stevens
Governor of Washington Territory
Present

Department of the Interior
Office of Indian Affairs
August 30, 1854

Sir:

By requisition of this Office, of the 12th instant, the sum of $10,000 will be placed in your hands, or remitted to you from the appropriation of $45,000 made by the act of Congress approved July 31st 1854, "for expenses of negotiating treaties with and making presents of goods and provisions to Indian Tribes in the Territory of Washington."

It is the expectation of the Department that the sum appropriated, will prove sufficient to defray all expenses incurred in and incidental to making conventional arrangements designed to be permanent, with all the Tribes and fragments of Tribes within your Superintendency, by which the United States will extinguish their claim of title to all the lands within the Territory, excepting such limited districts as it may be necessary to assign them for their occupancy in future; and I have now to inform you that you have been designated by the President as the Officer of the Indian Department to conduct the negotiations and conclude the treaties of amity and acquisition that are thus provided for.

The remittance of $10,000 above referred to, was made to enable you to enter upon the discharge of the duty hereby assigned you, so soon as you arrive in Washington Territory, and the funds will be applicable for the purchase of presents, of goods and provisions, and for defraying all expenses of a preliminary and incidental nature connected with the negotiations.

In accordance with the request made in your letter of the instant, I have directed the articles of Dry Goods and Hardware embraced in the schedules therewith furnished by you, to be procured from the contractors with this office for Indian Goods, and it is expected that the two lots, one of $8,000 in value, and one of $12,000 will be shipped from New York to San Francisco by fast sailing Clipper ship, in a few days, to be forwarded to you, as you requested; $8,000 to Columbia Barrack, care of the U.S.

Quartermaster, and $12,000 to Olympia. Schedules of the goods thus procured will be transmitted to you at Olympia, and as they will be shipped to the care of the Collector at San Francisco, you will correspond with him, as to the more safe, speedy, and proper way of landing them thence to their respective destinations.

In concluding articles or agreement and convention with the Indian Tribes in Washington Territory, you will endeavor to unite the numerous bands and fragments of tribes into tribes, and provide for the concentration of one or more of such tribes upon the reservations which may be set apart for their future homes.

The formation of distinct negotiations with each of the forty or fifty separate bands of Indians in Washington Territory, would be as likely to promote the best interests of the White settlers or of the Indians, as if the latter could be concentrated on a limited number of reservations, or on contiguous reservations in a limited number of districts of country apart from the settlements of the Whites.

Unless some such arrangement can probably be affected, you will at present, conclude treaties with such tribes or bands only, as are located immediately adjacent to the settlements of the Whites, and between whom and our own citizens animosities prevail, or disturbances of the peace are reasonably apprehended. And in entering upon the execution of the duty with which you are hereby charged, you will turn your atention first to such tribes and bands.

It is desirable that the stipulations to be fulfilled annually on the part of the United States, be few in number, and that the Department retain the authority to apply the funds to a variety of objects, such as the circumstances of the Indians at the time of payment may require.

This suggestion you will regard particularly if you are unable to effect the combination of all the Bands into six or eight Tribes, or to arrange half a dozen treaties or less, so that every one of the tribes shall be a party to one of them.

It is not deemed necessary to give you specific instructions as to the details of the treaties. I however enclose to you herewith, copies of the treaties recently concluded by

Supt. Palmer, at Table Rock and Cow Creek, Oregon Territory, with the Rogue River and Cow Creek Indians and the printed copies of treaties lately concluded at this city with the Omaha & Ottoe & Missouria Indians.

Those negotiated by Supt. Palmer are regarded as exhibiting provisions proper on the part of the Government & advantages to the Indians, and will afford you valuable suggestions. Those with the Omahas & Ottoes & Missourias, will indicate the policy of the Government in regard to the ultimate civilization of the Indian Tribes, the graduation of annuity payments to them, the encouragement of schools and missions among them, the exlusion of ardent spirits from their settlements, the security to be given against the application of their annuity funds for payment of debts and claims; the terms on which roads & railroads may be constructed through their reservations, and the authority proper to reserve to the President, of determining the manner in which annuities of Indians shall be applied for their benefit.

I would here remark, that the amounts secured to Tribes in Nebraska will not be a criterion for you, in regard to the amount of the annual or other payments to be made to Tribes in Washington, under stipulations of the proposed Treaties, in as much as the former held lands which had become valuable by reason of their proximity to the State of Iowa, whilst the latter have claims of title based on occupancy alone, and that occupancy of a nature not fixed, and well defined as to boundaries, and the land which they claim are far removed from the portions of the Country which have been long settled, & highly improved and cultivated.

I would also refer you to the late annual report of this Office, and the last annual report of the Secretary of the Interior, from which you will perceive that it is regarded by the Department as the best policy to avoid, as far as it can be judiciously done, the payment of Indian annuities in money, and to substitute implements of agriculture, stock, goods, and articles necessary to the comfort and civilization of the Tribes.

You will bear in mind the distance that separates you

from the Capitol, and the time which must elapse from the negotiation of treaties until you hear of the action of the President and Senate upon them; and you will hence caution the Indians against expecting the first payments of annuities too soon after the conclusion of negotiations.

You will at your early convenience, furnish to this Office a Skeleton Map of Washington Territory, showing the location of the different tribes and bands, and the boundaries of the regions respectively claimed by each; and as treaties are concluded from time to time, in your reports accompanying them, furnish a description of the reservation provided for the occupation of the Indians, with such precision, that it may be marked on a map here.

With these general views, you will nevertheless exercise a sound discretion, where the circumstances are such as to require a departure from them; and you will take care, in all treaties made, to leave no question open, out of which difficulties may hereafter arise, or by means of which the Treasury of the United States may be approached.

It is expected that a due regard to economy will govern all your acts, and that you will promptly report progress, in the execution of the trust now confided to you.

Very Respectfully
Your Obedt Servt
Charles E. Mix,
Acting Commissioner

His Excellency
Isaac I. Stevens
Governor of Washington Territory
Present.

GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

To all to whom these presents shall come, Greeting:

By virtue of the authority vested in me by the Administrator of General Services, I certify on his behalf, under the seal of the United States General Services Administration, that the attached reproduction(s) is a true and correct copy of documents in his custody.

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Records of the proceedings of the Commissioners
to hold Treaties with the Indian Tribes in Washington
Territory and the Blackfoot Country

Olympia W.T. Dec 7th

Gov. I. I. Stevens, the Commissioner
appointed by appointing James McClellan Secretary,
C. H. Mallet, Surveyor, H. D. Cleveland Secretary; and
Col. Shaw, Interpreter.

Lt. W. T. Simmons, Special Agent for the Nisqually
District, was present.

The Commissioner read a letter addressed by him to the
Secretary of the Interior enclosing Charges preferred against Mr. T.
Simmons Special Agent, & containing extracts from a letter from
Hon. Chas. Mason Chief Justice of this Territory, in which
which the said charges were completely denied and
refuted. The letter was ordered to file.

The Commissioner spoke of general objections among the Indian
Tribes in Washington Territory & the necessity of speedily en-
deavoring to settle with them & ascertaining their Reservations.

The Secretary then read treaties lately concluded by
the Board of Indian affairs with the Otoe Missouria Iowas and
the Omahas, and their provisions were fully discussed and
the purpose for treaties with Tribes West of the Cascades
mountains was considered.

After considerable discussion upon Reservations, Rivers
Stations, Forts, Schools &c. the Commissioner directed Mr.
G. Gibbs to prepare a Programme of the Treaty in accor-
dance with the views of the Commissioner.

The question of employing a Secretary Salaried for the
use of the Commissioner and translations of Indian Treaties
came up, & it was decided to employ such Secretary at
$700 per annum and entered by the Comm.

The Commissioner then adjourned to Dec 10th

Dec 10th

The Commissioner met & duly Organized.

Mr. Gibbs presented the written Draft of a Treaty which after
discussion and slight modifications was adopted as the
basis of the Treaties to be held with the Indian tribes upon the
Sound near the Straits of Juan de Fuca as follows.

It is proposed that on the 20th inst. the first
treaty will be commenced to be held at the Point
of the Nisqually on the 24th inst. As the ostensible
general purpose of the assembly to be explained to the Indians
is to settle their titles. The treaties to be signed on and for

of the Sound Indians to be the medium that he may address
and consult the Treaty. He to read and address and
point to be then given.

The first party to be composed of Indians from Sinnahomish
Territory to the Puyallup & Nisqually Hoods Canal, as
Reserves will be located there. Then the Duwamish and
so on down the Sound to Bellingham Bay & the Straits
Subsequently by land the Lower Cowlitz Country and
Columbia River.

Heads of Proposed Treaties.

Art. I. The following named Tribes and Bands cede to the
United States all their lands and interests &c.

Art. II. There is hereby secured to the use of said Tribes the
following tracts viz:

The right of fishing at Commonplaces & customary places
is also the right to Hunt, Pasture upon all open and
Unclaimed

May be required from our Reservation to another or
for purposes of improvement Head of Council

Art. III. The Tribes agree to remove to and settle on the afore-
said Reserved within one year after ratification of the Treaty, or
sooner if means are furnished them.

Art. IV. In consideration of the cession the United States agrees to
pay the said Tribes &c. the sums of $ (Rate $10. for
Chief - $7.50 for Sub Chief - $5. for Villagers) to be paid as
annuities and allowed as accruing at the rate of 5 per cent per
annum. NOTE The same Calculation on this principle to
be stated in gross in the Treaty. Thus 600, Nisqually at
$5 per head = $3.000 for the first year = $2.700 and so many
years. to be expended as Head Chiefs in the Presidents
shall direct.

Art. V. To build Shops near the Agency or other Reserves
to build houses for the Chiefs, as also to Mill, Smithy &c.
&c. in Some Reserve. The United States further agrees to keep a
Farmer agreed to the first years annuity

Art. VI. Should anything be divided the land and proje
ceed to heads of families.

The United States to maintain at the Central Agency
an agricultural School for the Tribes in Common
with the Tribes, Yakama Nisqually Flatheads &c.

Art. VII. The annuities not to be taken to pay debts of individuals.

Art. VIII. The Indians agree to be on friendly terms with the white. Reparations to be made out of annuity for any depredations committed on the United States citizens by Indians. Indians committing offenses against whites to be tried by the laws of the U. S. and if convicted punished. Injuries by Indians to whites to be in like manner punished according to law.

Each tribe to be responsible for offenses committed by its people. Any others who may be found among them to be looked to and required to depart from the Country at once. To be returned to the limits of their lawful authority by the Government.

Art. IX. No white man shall be allowed to reside on any Reservation, and Indians may at any time be compelled by superintending to stay there.

Art. X. Agrees to be bound to pay Reserve. If any Indian or white man any time and destroy it. Indians to forfeit the share of the Annuities.

Art. XII. Tribe may punish offenders of the one tribe for any offense committed according to the usages & customs of the Chief Council for the trial of the offenders.

Art. XIII. They agree to pay all claims held at the time of the treaty, and to make no more.

Art. XIV. System of Apprenticeship established.

Art. XV. They agree not to trade at Penn Island. No whites shall forge Indian permit to reside on their lands.

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In regard to the division of Tribes into Districts, and selecting their respective Reserves, the following rules to be considered as the utmost limits to be allowed.

Probable Reserve.

		Square Miles
1.	From Pugallup to Stanley Prairie by the Villages Squawkum, Nisqually, Pugallup. Perhaps all may be removed to Squawkum	611
2.	Dwamish, Suquamish &c One Village on East side of Hoods Canal.	1581
3.	Snoqualmoo and Snohomish One at mouth of Snohomish River	
4.	Skagit, Nikwallis &c One at mouth of Skagit River One " mouth of	
5.	Lummy, Nookshak &c One, on Samish One on Lummi	557
6.	Skallams, Chimakum & Skokomish One on Hoods Canal One on the Straits	982
7.	Macaws &c on Coast Two Villages	585
8.	Quillehute & Ozette Indians Two Villages	
9.	Chinooks & Lower Chihalis One on North side Bay Nasket	
10.	Duwamish One on the River	

It is known perhaps, if practicable, to remove all the Indians on the East side of the Sound as far as the Snohomish, as also the Skallams to Hoods Canal, and generally to adopt as few Reservations as possible, with the view of finally concentrating them in one.

RECORDS OF THE PROCEEDINGS OF THE COMMISSION TO HOLD TREATIES WITH THE INDIAN TRIBES IN WASHINGTON TERRITORY AND IN THE BLACKFOOT COUNTRY.

1854—Olympia, W.T. December 7th. Governor Isaac I. Stevens organized the Commission by appointing James Doty, Secretary, George Gibbs, Surveyor, H. A. Goldsborough, Commissary, and Frank Shaw, interpreter.

Col. M. T. Simmons, Special Agent for the Puget Sound District, was present.

The Commissioner read a letter addressed by him to the Secretary of the Interior concerning charges preferred against M. T. Simmons, Special Agent and containing extracts from a letter from Secretary C. H. Mason to the Commissioner upon the same subject in both of which letters the said charges were emphatically denied and refuted. The letter was ordered on file.

The Comissioner spoke of general operations among the Indian Tribes in Washington Territory and the necessity of speedily concluding Treaties with them and placing them on Reservations.

The Secretary then read Treaties lately concluded by the Commissioner of Indian Affairs with the Ottoe and Missouria Indians and the Omahas, and their provisions were fully discussed, and the proper form for Treaties with Tribes west of the Cascade Mountains was considered.

After considerable discussion upon Reservations, Fishing Stations, Farms, Schools etc. the Commissioner directed Mr. George Gibbs to prepare a programme of a Treaty in accordance with the views of the Commission.

The question of employing a small schooner for the use of the Commission and transportation of Indian Goods came up, and it was decided to employ such schooner at $700 per month manned and victualled by the owner.

The Commission then adjourned to December 10th.

Dec. 10th.—The Commission met and duly organized—Mr. Gibbs presented the outline Draft of a Treaty, which after

discussion and light modification was adopted as the basis of the Treaties to be held with the Tribes upon the Sound and the Pacific Coast, and is as follows:

"It is proposed that all the Indians to be first treated with, be seen and summoned to meet at the mouth of the Nisqually on the 24th inst. In the meantime the general purport of the assembly to be explained: The details to be settled there. The reserve to be agreed on and set apart. Gov. Stevens to be then notified that he may attend and conclude the Treaty—He to read them an address and a feast then to be given.

"The first party to be composed of Indians from Ininity Prairie to the Puyallup—next, probably Hood's Canal, as Reserves will be located there—then the Duamish and so on down the Sound to Bellingham Bay and the Straits—subsequently by land the lower coast, Cowlitz and Columbia Rivers."

Heads of Proposed Treaties

Art. I. The following named Tribes and Bands cede to the United States all their lands whatsoever.

Art. II. There is however reserved to the use of said Tribes the following tracts, viz:

The rights of fishing at common and accustomed places is further secured to them: Proviso against staked or fenced claims.

May be removed from one Reservation to another on payment for improvements and cost of removal.

Art. III. The Tribes agree to remove to and settle on the aforesaid Reserves within one year after ratification of the Treaty, or sooner if means are furnished them.

Art. IV. In consideration of the cession the United States agree to pay the said Tribes etc. the sum of $..... (rate $10.00 for chiefs—$7.50 for sub chiefs—$5 for Tillicum, to be paid in annual installments decreasing at the rate of 5 per cent per annum. *Note*-The sum calculated on this principle to be stated in gross in the Treaty. Thus 650

Nisquallys at $5 per head is $3,250 for the first year or $32,500 in twenty years, to be expended in such manner as the President shall direct.

Art. V. To enable them to move and settle on their Reserves to build houses for their chiefs, as also to indemnify settlers, if any, on lands reserved. The United States further agree to pay a bonus equal to the first years annuity.

Art. VI. President authorized to divide their land and assign lots to heads of families.

The United States to maintain at the Central Agency an Agricultural School free to their children in common with other Tribes and provide Medical Attendance.

Art. VII. The annuities not to be taken to pay debts of individuals.

Art. VIII. The Indians agree to be on friendly terms with the whites. Depredations to be made good out of annuity money. The United States also to indemnify Indians for horses stolen by the whites.

Not to make war on any other tribes but submit differences to agent. Depredations by one tribe against another to be paid out of annuities. Citizens of the United States may safely pass through their reserve. Roads may be run through them on compensation being made. Injuries committed by whites towards them not to be revenged, but on complaint being made they shall be tried by the Laws of the United States and if convicted the offenders punished. Injuries by Indians to whites to be in like manner prosecuted and punished according to law.

Every tribe to be responsible for offenses committed by its people or by others in their lands. Chiefs in the first instance to be looked to and required to deliver up criminals at once—To be in return supported in the exercise of their lawful authority, by the Government.

Art. IX. No white man shall be allowed to reside on any Reservations and Indians may at any time be compelled by Superintendent to stay there.

Art. X. Liquor to be excluded from Reserves—If brought, any Indian or white man may seize and destroy it. A drunken Indian to forfeit his share of the annuities.

Art. XII. Tribes may punish offenders of their own Tribe for any offense committed, according to their own laws, a majority of the Chief's forming a court for the trial of all offenders.

Art. XIII. They agree to free all slaves held at the time of the treaty, and to make no more.

Art. XIV. System of Apprenticeship introduced.

Art. XV. They agree not to trade at Vancouver Island, nor shall foreign Indians be permitted to reside on their lands.

"In regard to the Division of Tribes into Districts, and settling them upon Reserves, the following were to be considered as the utmost limits to be allowed."

PROBABLE RESERVES

	Souls
1. From Puyallup to Ininity Prairie	638
Say three villages, Squawskin, Nisqually, Puyallup. Perhaps all may be removed to Squawskin.	
2. D'Wamish, Suquamish etc.	454
One village on East side of Hoods Canal	
3. Snoquahoo and Snohomish	
One at mouth of Snohomish River	
4. Skagit, Kikiallis etc.	
One near mouth of Skagit River	
One near mouth of	
5. Lummi, Nooksakt etc.	
One on Samish	551
One on Lummi	
6. Sklallams, Chemacums and Skokomish	982
One on Hood's Canal	
One on the Straits	

7. Makahs etc. on Coast 585
   Two Villages.

8. Cowlitz and Upper Chehalis
   Two Villages.

9. Chinooks and Lower Chehalis
   One on north side of Grays Harbor.

10. Quini-utt.
    One on the River.